(14,598.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 140.

T. C. MATTINGLY, ADMINISTRATOR OF WILLIAM H. MATTINGLY, DECEASED, APPELLANT,

vs.

THE NORTHWESTERN VIRGINIA RAILROAD COMPANY, THE PARKERSBURG BRANCH RAILROAD COMPANY, AND THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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a The United States of America to The Northwestern Virginia Railroad Company, The Parkersburg Branch Railroad Company, and The Baltimore & Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of May next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein T. C. Mattingly, administrator with the will annexed of William H. Mattingly, deceased, is appellant and you are app-l-ees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. Jackson, judge of the district court of the United States for the district of West Virginia, this 14th day of April, in the year of our Lord one thousand eight hundred and ninety-one.

JOHN J. JACKSON,
Dist. Judge.

April 13th, '91.

b Service of within accepted April 17th, 1891.
JNO. A. HUTCHINSON,
Counsel for Def'ts.

1 Pleas held before the Honorable John J. Jackson, judge of the district court of the United States and as such associate justice of the circuit court of the United States for the district of West Virginia, at Parkersburg, on Tuesday, the 11th day of February, 1879, and in the 103d year of the Independence of the United States of America.

WILLIAM H. MATTINGLY
vs.
THE NORTHWESTERN VIRGINIA RAILROAD COMPANY *et al.* } In Equity.

The above-named defendant- this day tendered in open court a certified transcript of the record in this cause from the circuit court of Wood county, and upon *his* motion it is ordered that said record be filed and the said cause docketed in this court, which is accordingly done.

The record referred to in the foregoing order is in words and figures following, to wit:

Pleas before the judge of the circuit court of Wood county, West Virginia, at the court-house thereof, on the 23d day of January, 1879.

Be it remembered that heretofore, to wit, on the 24th day of February, 1869, came William H. Mattingly, by his attorney, and

sued out of the clerk's office of said court a subpœna in chancery against The Northwestern Virginia Railroad Company, The Parkersburg Branch Railroad Company, and The Baltimore & Ohio Railroad Company; which writ, with the sheriff's return thereon endorsed, is in the words and figures following, to wit:

The State of West Virginia to E. Mather, constable of Wood county, Greeting:

We command you that you summon The Northwestern
2 Virginia Railroad Company, The Parkersburg Branch Railroad Company, and The Baltimore & Ohio Railroad Company to appear before the judge of our circuit court for Wood county, at rules to be held in the clerk's office of said court on the first Monday in March next, to answer a bill in chancery exhibited against them in the said court by William H. Mattingly; and have then there this writ.

Witness William H. Hatcher, clerk of our said circuit —, at the court-house of said county, the 24th day of February, 1869, and in the 6th year of State.

W. H. HATCHER.

"Return."

Executed the within on P. G. Van Winkle, president of the Parkersburg Branch Railroad Company, by delivering a copy to J. G. Blackford, a member of his family, on the 27th day of Feb'y, 1869, and explaining the purport therein to him, the said Van Winkle not found at his usual place of abode, and executed by delivering a copy to W. W. Van Winkle, secretary of said company, on the 25th Feb'y, 1869, and J. W. Curtis, agent of the Baltimore & Ohio Railroad Company, a copy on the 25th Feb'y, 1869, all of which copies were delivered in the county of Wood, and there being no other officers of said companies upon whom process could be served in said county.

ELLIS MATHER,
Const. Park'b'g Th.

And on the same day another subpœna was issued, directed to the sheriff of Ohio, which is in the words and figures following, to wit:

The State of West Virginia to the sheriff of Ohio county, Greeting:

We command you that you summon The Northwestern Virginia
Railroad Company, The Parkersburg Branch Railroad Com-
3 pany, and The Baltimore & Ohio Railroad Company to appear before the judge of our circuit court for Wood county, at rules to be held in the clerk's office of said court on the first Monday in March next, to answer a bill in chancery exhibited against them in the said circuit court by William H. Mattingly; and have then there this writ.

Witness William H. Hatcher, clerk of our said circuit court, at

the court-house of said county, the 24th day of February, 1869, and in the 6th year of the State.

W. H. HATCHER.

"*Return.*"

Served, by copy, on George H. Lee, attorney, &c., Feb'y 26th, 1869.

THOMAS J. CAMPBELL, *S. O. C.*

And on the same day another subpœna was issued, directed to the sheriff of Harrison county, which is in the words and figures following, to wit:

The State of West Virginia to the sheriff of Harrison county, Greeting:

We command you that you summon The Northwestern Virginia Railroad Company, The Parkersburg Branch Railroad Company, and The Baltimore and Ohio Railroad Company to appear before the judge of our circuit court for Wood county, at rules to be held in the clerk's office of said court on the first Monday in March next, to answer a bill in chancery exhibited against them in the said court by William H. Mattingly; and have then there this writ.

Witness William H. Hatcher, clerk of our said circuit court, at the court-house of said county, the 24th day of February,
4 1869, and in the 6th year of the State.

W. H. HATCHER.

"*Return.*"

Executed the within summons on Geo. H. Lee on the 1st day of March, 1869, by delivering to him in person an office copy hereof.

P. H. GOODWIN, *D. S.*,
For T. F. ROANE, *S. H. C.*

And at another day, to wit, at rules held in clerk's office of said court on the first Monday in March, 1870, came William H. Mattingly, by his attorney, and filed his bill and exhibits against the defendants; which said bill is in the words and figures following, to wit:

"*Bill.*"

To the Honorable George Loomis, judge of the circuit court of Wood county:

Humbly complaining, your orator, William H. Mattingly, of the county of Wood, respectfully represents to your honor that the Northwestern Virginia Railroad Company was and continued to be a corporation chartered under — by virtue of an act of the General Assembly of Virginia, passed 4th Feb'y, 1871 (1851), to construct a railroad from some point on the B. & O. railroad to the Ohio river at Parkersburg, in the county of Wood, through a portion of the State of Virginia. Your orator further represents that said railroad

was wholly in this State and runs through the county of Taylor, Harrison, Doddridge, Ritchie, and Wood. He was a contractor on said railroad and did a considerable work upon the same from time to time, and that the said company became largely indebted to him for the same. Your orator further represents that said railroad company, in order to raise money for the completion of said road and equip the same, were compelled to execute sundry mort-
5 gages and deeds of trust upon all the property of said Northwestern Virginia Railroad Company of every kind, nature, and description the same may be, as well that which they may (did) at the time actually hold as that which in the prosecution, stocking, completion, and working the said railroad shall be accumulated thereon. The first of these mortgages, known as mortgage No. 1, was executed on the 21st day of March, 1853, for the purpose of securing and indemnifying the city of Baltimore to the amount of one million and a half dollars of the bonds of said company guaranteed by said city of Baltimore, a copy of which mortgage is herewith filed, marked "A," and made a part of this bill.

The second of these mortgages, known as mortgage No. 2, was also made on the 21st day of March, 1853, for the purpose of securing and indemnifying the Baltimore & Ohio Railroad Company to the amount of one million of dollars in bonds of said company, the N. W. Va. Railroad Company, which were guaranteed by the said B. & O. Railroad Company, a copy of which mortgage is herewith filed, marked "B," and prayed to be read as part of this bill.

The third one of these mortgages, known as mortgage No. 3, was made on the first day of January, 1855, to James Cook, trustee, to secure certain certificates of loan and indebtedness, with coupons attached, not exceeding two millions of dollars in amount, a copy of which mortgage is herewith filed, marked "C," and made a part of this bill.

Your orator further represents that he is the owner and has now in his possession bonds dated January 1st, 1855, Nos. 4063, 4064, 4065, 4066, 4067, 4068, 4069, and 4070, and also bonds numbered 4562 and 4619, and which are for the sum of $500 each, with coupons attached of $15 each, payable semi-annually. Your orator further represents that there are now due and unpaid on each of said bonds eighteen coupons of fifteen dollars each, making
6 now due on each bond $270 and a total sum due your orator on said bonds, $2,700. Your orator will, if desired, exhibit said bonds and coupons to the court at any time he may be directed so to do. Your orator further represents and charges that said bonds are secured by the said third mortgage, hereinbefore described, upon the property of said railroad company, and that no part thereof has been paid, and that they therefore constitute a valid and binding lien upon the said road and all its property, in whosoever hand it may be.

Your orator further represents and charges that after the execution of the said last-mentioned and third mortgage and after the same had been properly recorded the mayor and city council of Baltimore, on the 28th day of July, 1864, under a certain written

assignment, whereby they assign- all their benefits and rights under and by virtue of the said first mortgage to the said Baltimore and Ohio Railroad Company, a copy of which assignment is herewith filed, marked "D," and prayed to be read as part of this bill.

Your orator further represents that on the 15th day of February, 1865, the property of every kind and description belonging to the Northwestern Virginia Railroad Company was sold by the mayor and city council of Baltimore at public auction under the pretended authority of the deed to said mayor and city council dated the 21st March, 1853, and the same was purchased by and for account of the said B. & O. Railroad Company at the price of $32,000, and that the said mayor and city council of Baltimore, by deed dated the 3rd April, 1865, conveyed all of said property to the said B. & O. Railroad Company by the name of the "Parkersburg Branch Rail- Company," a copy of which deed is herewith filed, marked "E," and prayed to be taken as part of this bill.

Your orator charges that said mayor and city council of Baltimore had no authority to sell said property or to make said
7 deed; that the said first mortgage did not authorize them to sell and it was never foreclosed by the decree of any court, and that it did not on its face purport to authorize the said mayor and city council to make any sale whenever they saw fit so to do. Your orator therefore charges that said sale was null and void, and that the said last-mentioned deed, of date the 3rd day of April, 1865, was also null and void and passed no title because the grantors had no authority to make the same and should, therefore, be cancelled and annulled by this honorable court. Your orator further charges that if said deed shall be permitted to stand in full force and operation all those persons who are secured by said third mortgage will be greatly prejudiced, inasmuch as they will lose their whole debts, and, inasmuch as your orator has no other security, it will greatly injure and damage him and subject him to great loss.

Your orator charges that the said mortgage on its face conferred no power to the beneficiaries in the same to dispose of the property therein mortgaged. It was a mere benefit and not coupled with power, and therefore the said B. & O. railroad took nothing under the sale to them, and the deed made to them passed no title to said property.

Your orator further represents that said Northwestern Virginia Railroad Company became possessed of a very large and valuable real estate in this State situate in the county of Wood, and that upon the 21st day of December, 1857, they executed and placed upon record a deed of trust upon the said real estate to one James Cook, as trustee, to secure certain monies therein mentioned and indemnify and save harmless certain parties named therein, a copy of which deed of trust is herewith filed, marked "F," and made part of this bill. Your orator charges that said deed of trust is subsequent to the three mortgages hereinbefore referred to and made part of this bill, and that said mortgages, each and all
8 of them, have priority over said deed of trust, and that the

property therein is liable, first, to the payment of said mortgages in the order of their priority, unless released by the beneficiaries therein named. Your orator further charges that the said Baltimore & Ohio Railroad Company, who *was* the holder and owner of the first two of said mortgages and who were entitled to have the proceeds of sale of said real estate applied first to the payment of their debts, did release and place upon record such release of said real estate, as will appear by a copy of said release endorsed on said deed of trust, Exhibit "F," of date the 24th day of December, 1857, and prayed to be taken and read as a part of this bill, three days after the date of the execution of said trust deed to said trustee, James Cook. Your orator avers that this paper constitutes in law a release or postponement of the lien of said two mortgages upon said real estate in said trust deed mentioned, whereby the said third mortgage was made the oldest and prior lien upon said real estate, and that the proceeds of any sale of said real estate should be applied to the payment of the said third-mortgage bonds in the hands of any lawful owner thereof, of whom your orator is one.

Your orator further represents that said James Cook, trustee as aforesaid, as your orator is informed, in pursuance of his duties as such trustee, advertised said real estate for sale, according to the terms and requirements of said trust deed, but for what sums the said real estate was sold your orator is not informed, unless it be the sum recited in the deed to the purchaser of said real estate, the said Baltimore and Ohio Railroad Company, a copy of which deed is herewith filed, marked (G), and prayed to be read as part of this bill. Your orator charges that said property was and is very valuable, and that it was worth largely over the sum set out in said trust deed, to wit, the sum of $16,339.00, if that was the amount of the purchase-money paid by said B. & O. R. R. Company
9 for said property. Your orator is informed that said property was sold in gross and not in parcels, and if the same had been sold in parcels at that time it would have brought more money.

Your orator further charges that said real estate and the proceeds of the sale thereof were first liable to the payment of the persons who held the third-mortgage bonds, and that none of the same could be applied to the payment of the debts or parties secured by said deed of trust to said James Cook of date the 21st day of December, 1857.

Your orator therefore charges that his bonds are secured upon said real estate by said third-mortgage deed; that the same is a valid lien thereon in the hands of the vendees, the Baltimore & Ohio Railroad Company, who are now claiming to hold the same under the sale made to them by said Cook as such trustee, and your orator is informed and so charges that if said — acquired any title to said property it is subject to and subordinate to the claim of your orator as one of the beneficiaries in said third mortgage, and your orator has a right to come into this court and ask for a foreclosure of said third mortgage as against said property also.

Your orator therefore, in conclusion, claims—

First. That the sale made by the city of Baltimore of all the property of the Northwestern Virginia Railroad Company to the Baltimore & Ohio Railroad Company under and by virtue of said first mortgage was illegal, null, and void, because said mortgage upon its face did not confer any power upon said city of Baltimore to make such sale, and that such sale could alone be authorized and directed by a court of equity upon a proper bill and proceedings thereon to foreclose said mortgage according to the rules governing such cases.

Second. That the sale made by James Cook, trustee, under the deed of trust made to him, only conveyed the said property
10 subject to the lien of said third mortgage, because the first and second mortgages being released, as appears by the memorandum signed by said B. & O. R. R. Co. at the foot of said trust deed, the said third mortgage became the oldest and valid lien upon said real estate and had priority over said trust deed.

In tender consideration of all which facts, and inasmuch as your orator is without remedy save in a court of equity, your orator prays that the Northwestern Virginia Railroad Company, the Parkersburg Branch Railroad Company, under which name the said Northwestern Virginia Railroad Company has been reorganized and is now known and operated, and the Baltimore and Ohio Railroad Company, and the mayor and city council of Baltimore be made defendants to this bill, and that they and each of them do answer particularly the several charges, recitals, and allegations in this bill contained as if thereto particularly and specifically interrogated, and that, the premises being considered, your honor will grant your orator a decree for the amount of his money due him upon the bonds aforesaid and secured in said third mortgage; that the sale made by the city of Baltimore to the Baltimore & Ohio Railroad Company of all the property and effects of the said Northwestern Virginia Railroad Company, as well as the road itself, be set aside, cancelled, and annulled, and that your honor will decree a foreclosure of said third mortgage, and that said railroad and all its property, of whatever character, including the real estate embraced in the deed of trust to James Cook, trustee, be sold to pay your orator his aforesaid debt or be divided among the parties entitled to it, and that your honor will make such a decree in the premises as shall be deemed equitable and right to all the parties interested and grant to your orator such other, further, and general relief as may be consonant to equity and good conscience; and, as
11 in duty bound, your orator will ever pray, &c.

W. H. MATTINGLY,
By JACKSON & SMALL, *Att'ys.*

EXHIBITS REFERRED TO IN BILL.

"A."

This indenture made this twenty-first day of March, in the year of our Lord eighteen hundred and fifty-three, between the North-

western Virginia Railroad Company, a corporation created by an act of General Assembly of the State of Virginia, passed on the fourteenth day of February, in the year eighteen hundred and fifty-one, of the first part, and the mayor and city of Baltimore, of the second part, witnesseth: The mayor and city council of Baltimore did, by an ordinance approved on the fifth day of June in the year eighteen hundred and fifty-two, make it a prerequisite to the delivery to the said company of certain bonds of said company, after the same had been guaranteed by the said mayor and city council as provided for in the said ordinance, that the said company should execute to the mayor and city council aforesaid a good and sufficient deed pledging the property of the said company for the payment of said bonds, or certificates of loan, and the interest thereon according to their tenor, in which deed there should be a proviso that the mayor and city council of Baltimore having first obtained authority from the legislature of Maryland so as to so, might, at any time during the construction or within five years after the completion of the said Northwestern Virginia railroad elect to take stock at par in the said Northwestern Virginia Railroad Company, to the amount of the bonds or certificates of loan so guaranteed, or any part thereof, the said mayor and city council, in that event releasing the said Northwestern Virginia *Virginia* Railroad Company from all liability, and guaranteeing said company from
12 all loss on account of said bonds, or such amount thereof as correspond to the amount of stock so elected to be taken, assuring the payment of the same in the hands of the third parties without recourse thereafter for principal or interest to the said Northwestern Virginia Railroad Company. And the said parties of the first part have issued the bonds referred to bearing even date herewith, for the sum of one million and a half dollars in sums of one thousand dollars and five hundred dollars in the following words and figures:

— one No. $1,000.

UNITED STATES OF AMERICA, *State of Virginia.*

Northwestern Virginia Railroad Company.

PARKERSBURG, *January 1st*, 1853.

This is to certify that the Northwestern Virginia Railroad Company, a corporation created by an act of the General Assembly of the State of Virginia passed on the 14th day of February, 1851, are indebted to Columbus O'Donnel or bearer, in the sum of one thousand dollars, lawful money of the United States of America, payable on the first day of January in the year one thousand eight hundred and seventy-three, in the city of Baltimore, on the surrender of this certificate of loan, with interest thereon in the interval, at the rate of six per cent. per annum, payable semi-annually, in the city of Baltimore, on the first days of July and January in each and every year, on the presentation of the respective half-yearly coupons hereto attached, which payment of principal and

interest is secured by the guarantee of the mayor and city council of Baltimore hereon endorsed. And by virtue of, and in conformity with the act of the General Assembly of Virginia passed as aforesaid, the property of the said company is hereby pledged for the payment of the principal of this certificate and the interest that may accrue thereon, according to the terms of a mortgage from the said Northwestern Virginia Railroad Company to the said mayor and city council of Baltimore bearing even date herewith.

In witness whereof, the president of the Northwestern Vir-
13 ginia Railroad Company hath set his hand and caused the seal of the said company to be affixed hereto on the first day of January in the year one thousand eight hundred and fifty-three.

[4 S.] TH. SWAIN, *President.*

Countersigned:

P. G. VAN WINKLE, *Secretary.*

On which there is endorsed the following guarantee by the said mayor and city council of Baltimore:

— do hereby guarantee the payment of the within certificate of loan, with the interest thereon, according to its tenor, under the authority of an act of the General Assembly of Maryland passed at January session, 1852, entitled An act giving certain powers to the mayor and city council of Baltimore in regard to the Northwestern Virginia Railroad Company, and in pursuance of an ordinance of the said mayor and city council passed on the fifth day of June, in the year 1852, entitled An ordinance to guarantee the bonds of the Northwestern Virginia Railroad Company.

In testimony whereof John Smith Hollins, mayor of the said city, hath hereunto subscribed his name and caused the corporate seal of the said mayor and city council to be hereto affixed on this — day of ——, in the year one thousand eight hundred and fifty-three.

—— ——, *Mayor.*

Countersigned:

—— ——, *Register.*

And whereas it is the purpose of said parties of the first part to give hereby the pledge required by the ordinance aforesaid, now this indenture witnesseth: That the said parties of the first part, for and in consideration of the premises and of the sum of five dollars to them paid by the said parties of the second part at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, and in pursuance of the authority given by the
14 fourth section of the act of assembly of Virginia aforesaid, have granted and by these presents do grant unto the mayor and city council of Baltimore all the property of the Northwestern Virginia Railroad Company of every kind, nature, and description the same may be, as well as that which they may at this time actually hold as that which in the prosecution, completion, stocking, and working of the said railroad shall be accumulated thereon, in trust to secure the payment of the said bonds or certificates of loan,

with the interest thereon, according to their tenor, to the end that the said mayor and city council of Baltimore may be saved harmless and indemnified from all loss or injury consequent in any manner upon the guarantee hereinbefore mentioned; and the said Northwestern Virginia Railroad Company hereby obligate themselves to keep the said road in good order and well stocked, and the said Northwestern Virginia Railroad Company doth hereby stipulate, agree, and provide that the said mayor and city council of Baltimore, having first obtained authority from the legislature of Maryland so to do, may, at any time during the construction or at any time within five years after the completion of said road, elect to take stock at par in the Northwestern Virginia Railroad Company to the amount of the bonds or certificates of loan as guaranteed or any part thereof, provided the said mayor and city council shall in that event release the said Northwestern Virginia Railroad Company from all loss on account of the said bonds or such amount thereof as corresponds to the amount of stock so elected to be taken and assume the payment of the same in the hands of third parties without recourse thereafter for principal or interest to the said Northwestern Virginia Railroad Company; and the said Northwestern Virginia Railroad Company have directed Thos. Swain, their president, to acknowledge this indenture, that the same may be duly recorded according to law.

15 In testimony whereof the said Northwestern Virginia Railroad Compaay have caused these presents to be sealed with their seal and to be signed by their president on the day and year first above written.

THOS. SWAIN,
President N. W. Va. R. R. Co.

Signed, sealed, and delivered in the presence of—
—— ——.

STATE OF MARYLAND, }
Baltimore City. }

Be it remembered and it is hereby certified that on this twenty-first day of March, in the year of our Lord one thousand eight hundred and fifty-three, before me, the subscriber, a commissioner appointed by the State of Virginia for the said State of Maryland, personally appeared Thos. Swain, the president of the said Northwestern Virginia Railroad Company, whose name is signed to the writing above, bearing date on the twenty-first day of March, 1853, and acknowledged the same before me, in the State aforesaid, to be the act and deed of the said Northwestern Virginia Railroad Company.

Given under my hand and seal on the day and year first aforesaid.

(4 S.) JABEY D. PRATT,
Com's. for Virginia.

VIRGINIA, *ss:*

I, H. H. Dils, clerk of the county court of Wood county, do hereby certify that the foregoing is a true copy of a mortgage from the Northwestern Virginia Railroad Company to the mayor and city council of Baltimore, together with the certificate of acknowledgment by Thomas Swain, president of Northwestern Virginia Railroad Company, thereafter written, and that the same was received by me in my office for the purpose of being recorded and admitted to record on the 24th day of March, 1853.

Attest: H. H. DILS, *Clerk.*

Copy.
Teste: EDW'D M. HOIT, *R. W. C.*

Book 6, folio 430.

16 EXHIBIT B.

This indenture made this twenty-first day of March, in the year eighteen hundred and fifty-three, between the Northwestern Virginia Railroad Company, a corporation created by an act of the General Assembly of the State of Virginia passed on the fourteenth day of February, in the year eighteen hundred and fifty-two, of the first part, and the Baltimore and Ohio Railroad Company of the second part: Whereas, the said Baltimore and Ohio Railroad Company by a resolution passed on the — day of ——, in the year eighteen hundred and fifty-three agreed to guarantee the bonds of the Northwestern Virginia Railroad Company aforesaid, for the sum of one million of dollars, in sums of one thousand dollars, and five hundred dollars, payable on the first day of January in the year eighteen hundred and seventy-three, in the city of Baltimore, with interest, at the rate of six per cent. per annum, payable semi-annually on the first day of July and January in each and every year (in the meanwhile the said principal and interest being secured by a pledge of the property of the said Northwestern Virginia Railroad Company, subject to a mortgage to the mayor and city council of Baltimore to secure the guarantee given by that corporation to the amount of one and a half million of dollars). And whereas, the said parties of the first part, have issued the bonds referred to, bearing even date herewith, for the sum of one million of dollars, in the following words and figures:

No. —. $1,000.

UNITED STATES OF AMERICA, *State of Virginia.*

Northwestern Virginia Railroad Company.

PARKERSBURG, *January 1st,* 1853.

This is to certify that the Northwestern Virginia Railroad Company, a corporation created by an act of the General Assembly
17 of the State of Virginia, passed on the fourteenth day of February, eighteen hundred and fifty-one, are indebted unto

—— —— or bearer, in the sum of five hundred dollars lawful money of the United States of America, payable on the first day of January in the year eighteen hundred and seventy-three in the city of Baltimore, on the surrender of this certificate of loan, with interest thereon in the interval at the rate of six per cent. per annum, payable semi-annually, in the city of Baltimore, on the first days of July and January in each and every year on the presentation of the respective half-yearly coupons hereto attached (which payment of principal and interest is secured by the guarantee of the Baltimore and Ohio railroad hereon endorsed, and by virtue of, and in conformity with the act of the General Assembly of Virginia passed as aforesaid, the property of the said company is hereby pledged for the payment of the principal of this certificate and the interest that may accrue thereon, according to the terms of a mortgage from the said Northwestern Virginia Railroad Company to the said Baltimore and Ohio Railroad Company, bearing even date herewith, it being declared however, that this certificate of loan shall be convertible at the pleasure of the holder into the stock of the company at par, at any time, prior to the first day of March, 1860.

In witness whereof, the president of the Northwestern Virginia Railroad Company hath hereunto set his hand and caused the seal of the said company to be affixed hereto, on the first day of January, in the year eighteen hundred and fifty-three.

THOS. SWAIN, *President.*

Countersigned:

P. G. VAN WINKLE, *Secretary.*

On which there is endorsed the following guarantee by the said Baltimore & Ohio Railroad Company:

18 "For value received, the Baltimore and Ohio Railroad Company do hereby guarantee the payment of the within certificate of loan, with the interest thereon according to its tenor, under the authority of an act of the General Assembly of Maryland, passed on the 29th day of May, 1852, entitled An act to permit the Baltimore & Ohio Railroad Company to lend their aid or credit to the Northwestern Virginia railroad, and in pursuance of a resolution of the board of directors of the said Baltimore and Ohio Railroad Company, passed on the — day of ——, in the year eighteen hundred and fifty-three, it being understood that this guarantee shall not affect the dividend to which the State of Maryland would be entitled as a stockholder in the Baltimore and Ohio Railroad Company, or interfere with any existing priorities of the said State.

In witness whereof the president of said Baltimore and Ohio Railroad Company hath hereto set his hand and caused the seal of said company to be affixed hereto this — day of ——, in the year eighteen hundred and fifty-three.

—— ——, *President.*

—— ——, *Secretary.*"

And whereas, it is the purpose of said parties of the first part to execute the mortgage referred to on the face of the said certificates

of loan, now, this indenture witnesseth: That the said parties of the first part for and in consideration of the premises, and of the sum of five dollars to them paid by the said party of the second part, at and before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, and in pursuance of the authority given by the 4th section of the act of assembly of Virginia aforesaid, have granted, and by these presents do grant unto the said parties of the second part all the property of the Northwestern Virginia Railroad Company of every kind, nature and description the same may be, as well that which they may at the time actually hold as that which in the prosecution, stocking, completion and working of the said railroad shall be accumulated thereon,
19 in trust, to secure the payment of the said bonds or certificates of loan hereinbefore mentioned and the interest thereon, according to their tenor, subject nevertheless to a prior mortgage to the mayor and city council of Baltimore as indemnity against loss consequent upon the guarantee by the said mayor and city council of the certificates of loan of the said parties of the first part for the sum of one million five hundred thousand dollars, and the said Northwestern Virginia Railroad Company have directed Thos. Swain, their president, to acknowledge this indenture before any person or persons having authority by law to take the said acknowledgment in order that this indenture may be duly recorded.

In testimony whereof the said Northwestern Virginia Railroad Company have caused these presents to be sealed with their seal, and to be signed by their president on the day and year first above written.

THOS. SWAIN,
[SEAL.] *President N. W. Va. R. R. Co.*

Signed, sealed, and delivered in the presence of—

——— ———.

STATE OF MARYLAND, }
City of Baltimore, } *ss:*

On this first day of March, in the year eighteen hundred and fifty-three, before me, the subscriber, a commissioner appointed by the governor of the State of Virginia for the said State of Maryland, personally appeared Thos. Swain, the president of the said Northwestern Virginia Railroad Company, whose name is signed to the writing above, bearing date on the twenty-first day of March, 1853, and acknowledged the same before me, in the State aforesaid, to be the act and deed of the said Northwestern Virginia Railroad Company.

Given under my hand and seal the day and year aforesaid.

[SEAL.] JABEY D. PRATT,
Com'r for Virginia.

20 Form of the above deed approved.

BENJ'N C. PRESTMAN,
Counselor for the City of Baltimore.

VIRGINIA:

I, Henry H. Dils, clerk of the county court of Wood county, do hereby certify that the foregoing is a true copy of a mortgage from the Northwestern Virginia Railroad Company to the Baltimore and Ohio Railroad Company, together with the certificate of acknowledgment of Thos. Swain, the president of the said Northwestern Virginia Railroad Company thereabove written, and that the same was received by me in my office for the purpose of being recorded and admitted to record on the 24th day of March, 1853.

HENRY H. DILS, *Clerk.*

Copy.
Teste:

EDW'D M. HOIT,
Recorder Wood County.

D. B. 16, folio 432.

EXHIBIT "C."

This indenture made this first day of January in the year eighteen hundred and fifty-five, between the Northwestern Virginia Railroad Company, a corporation created by an act of the General Assembly of the State of Virginia passed on the 14th day of February, 1851, of the first part, and James Cook of Parkersburg, in the said State of Virginia, trustee, as hereinafter named of the second part. Whereas the said parties of the first part are about to issue their bonds, or certificates of loan in various amounts, not exceeding in the whole two million dollars, with coupons thereto attached, for the interest falling due thereon semi-annually accounting from the first day of January, 1855, on which day the said bonds will bear date until the first day of January, 1885, at which time
21 the said bonds will mature and become payable; and whereas, the parties of the first part have caused the said bonds and coupons to be prepared in the following words and figures, that is to say:

UNITED STATES OF AMERICA, *State of Virginia.*

Northwestern Virginia Railroad Company.

PARKERSBURG, *January* 1, 1855.

This is to certify that the Northwestern Virginia Railroad Company (a corporation created by an act of the General Assembly of the State of Virginia, passed on the 14th day of February, 1851,) are indebted to Columbus O'Donnell or bearer in the sum of — dollars lawful money of the United States of America, payable on the first day of January, in the year one thousand eight hundred and eighty-five in the city of Baltimore, on the surrender of this certificate of loan with interest thereon in the interval, at the rate of six per cent. per annum, payable semi-annually in the city of Baltimore, on the first days of July and January in each and every year on the presetation of the respective half-yearly coupons hereto attached. And by virtue of and in conformity with the act of the General Assembly of Virginia passed as aforesaid, the property of the said company is hereby pledged for the payment of the prin-

cipal of this certificate, and the interest that may accrue thereon, according to the terms of a mortgage from the said Northwestern Virginia Railroad Company to James Cook, trustee, bearing even date herewith.

In witness whereof, the president of the said Northwestern Virginia Railroad Company hath set his hand and caused the seal of the said company to be affixed hereto on the first day of January, in the year one thousand eight hundred and fifty-five.

Form of Coupon.

The Northwestern Virginia Railroad Company will pay to bearer on the — day of ——, 18—, for six months' interest on certificates of loan No. — — dollars in the city of Baltimore.

—— ——, *Sec't'y.*

22 And whereas it is the purpose of the said parties of the first part to pledge the property of the said company for the payment of the said bonds, in conformity with the authority given in and by the act of Assembly of the State of Virginia aforesaid, Now, therefore, this indenture witnesseth: That the said parties of the first part, for and in consideration of the premises, and of the sum of five dollars to them in hand paid, by the said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in pursuance of the authority given by the fourth section of the act of the assembly aforesaid, have granted and by these presents do grant unto the said party of the second part, all the property of the said Northwestern Virginia Railroad Company of whatever kind, nature and description the same may be, as well that which they may at this time actually hold as that which in the prosecution, completion, stocking and working of the said railroad shall be accumulated thereon, in trust, to secure the payment of the said bonds, or certificates of loan, with the interest thereon according to their tenor, subject nevertheless, to a prior mortgage or deed of trust to the mayor and city council of Baltimore, dated on the first day of January in the year one thousand eight hundred and fifty-three, as indemnity against loss consequent upon the guarantee by the said mayor and city council of the certificates of loan of the said parties of the first part, and interest thereon, mentioned therein, for the sum of one million five hundred thousand dollars, and another mortgage to the Baltimore and Ohio Railroad Company, dated the first day of January, in the year one thousand eight hundred and fifty-three to secure the payment of certificates of loan and interest thereon, mentioned therein, to the amount of one million of dollars.

In testimony whereof the president of the Northwestern Virginia Railroad Company hath set his hand and caused the seal
23 of the said company to be affixed hereto the day and year first above written.

[SEAL.] THOS. SWANN, *President.*

Signed, sealed, and delivered in presence of —— ——, the words "one hundred thousand" being first cancelled in the 9th and 10th lines of the first page.

STATE OF MARYLAND, *City of Baltimore*, } *To wit:*

I, James B. Latimer, a commissioner appointed by the governor of the State of Virginia for the said State of Maryland, certify that Thomas Swann, the president of the Northwestern Virginia Railroad Company, whose name is signed to the writing above, bearing date on the first day of January, in the year one thousand eight hundred and fifty-five, has acknowledged the same as the act and deed of the said company in my State aforesaid.

Given under my hand and official seal this nineteenth day of June, in the year one thousand eight hundred and fifty-five.

[SEAL.] J. B. LATIMER.

VIRGINIA:

WOOD COUNTY, CLERK'S OFFICE, 25 *June*, 1855.

The foregoing deed of trust, with the certificate of the acknowledgment of the same thereto annexed, was received in said office and admitted to record.

Teste: H. H. DILS, *Clerk.*

Copy.
Teste: EDW'D M. HOIT, *R. W. Co.*

24 EXHIBIT "D."

This deed made this 28th day of July, in the year 1864, between the mayor and city council of Baltimore of the first part, and the Baltimore & Ohio Railroad Company of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one million two hundred thousand dollars paid by the said Baltimore and Ohio Railroad Company to the said party of the first part, prior to the delivery of these presents, have granted, bargained and sold, assigned, transferred and set over unto the said company all the right, title and interest, present and prospective, of the said party of the first part, in and to a certain indenture of mortgage from the Northwestern Virginia Railroad Company, to the said mayor and city council, dated on the twenty-first day of March in the year eighteen hundred and fifty-three, the scope and effect of which was to guarantee the said mayor and city council against all loss or injury that might accrue to the said mayor and city council by reason of their endorsement of certain bonds of the said Northwestern Virginia Railroad Company therein mentioned, and the coupons thereafter, according to their tenor, together with the property and effects described therein, the object of the deed being to substitute the said Baltimore and Ohio Railroad Company to all intents and purposes in place of the mayor and city council now and hereafter, and to give to said last-named company all the right which the said mayor and city council would have had, had they continued to hols the said mortgage, and had been obliged to pay the principal and interest of the bonds so as aforesaid guaranteed

by the said mayor and city council; and this deed further witnesseth: That the said mayor and city council, for and in consideration of the payment to them as aforesaid of one million two hundred thousand dollars by the said Baltimore and Ohio Railroad Company do
25 hereby covenant and agree with the last-named company, its successors and assigns, that they, the said mayor and city council will pay as the same accrues, the interest due on the bonds aforesaid, and the principal of said bonds at maturity, to the holders thereof, so as to relieve the property and effects of every description effected by the said mortgage from all claims and demands that might by possibility be brought against the same by or on behalf of the holders of said bonds so as aforesaid guaranteed, to the end, that the said Baltimore and Ohio Railroad Company may in virtue of the payment of said one million two hundred thousand dollars, and of these presents, hold the said property and effects, as though the said last-named company had been the endorser of said bonds and coupons, and had paid the same and foreclosed the said mortgage. And this indenture further witnesseth: That the said mayor and city council, for and in consideration of the payment aforesaid, of one million two hundred thousand dollars, by the said Baltimore and Ohio Railroad Company as aforesaid, do hereby covenant and agree with the last-named company to indemnify it against all claims and demands arising out of the bonds of the said Northwestern Virginia Railroad Company, for the interest thereon which matured on the first day of July, 1856, or on the first day of July, 1861, or subsequently thereto, as well as that which may hereafter mature or accrue, and the said mayor and city council do hereby release and discharge the said Baltimore and Ohio Railroad Company from all claims that they may have in any manner against the said last-named company for interest on the bonds so guaranteed by the said mayor and city council by reason of any agreement heretofore entered into between the said Baltimore and Ohio Railroad Company and the said Northwestern Virginia Railroad Company; and this deed further witnesseth: That the said mayor and city council of Baltimore, for the consideration
26 aforesaid, do hereby assign and transfer to the said Baltimore and Ohio Railroad Company, all bonds, notes and other obligations and securities held by the said mayor and city council of the said Northwestern Virginia Railroad Company, or which the said mayor and city council is now entitled to claim or hold, excepting $25,000 of the coupon bonds of the Union Railroad Company.

Memorandum.

The authority for the execution of this deed is to be found in a resolution of the mayor and city council of Baltimore, approved on the twenty-second day of April, in the year eighteen hundred and sixty-four, authorizing the commissioner of finance to act in the premises.

In testimony whereof the mayor and city council of Baltimore have caused these presents to be sealed with their corporate seal

and signed by the mayor of said city, who also, with F. Letting Schaffer and Evan L. Ellicott, as commissioners of finance of said city, sign the same in evidence of their assent to and participation in the premises under the resolution aforesaid.

(City of Baltimore, 1797.)

JOHN LEE CHAPMAN, *Mayor.*
JOHN LEE CHAPMAN,
F. LETTING SHAFFER,
EVAN L. ELLIOTT,
Commissioners of Finance.

Witness:
WM. PRICE.

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

I, Leander Warren, notary public, duly commissioned and sworn in and for the city of Baltimore aforesaid, do certify that John Lee Chapman, mayor of the city of Baltimore as well as one of the commissioners of finance of said city, and F. Letting Shaffer and Evan L. Elliott, the other commissioner- of finance, whose names are signed to the above and hereto annexed writing, bearing date on the twenty-eighth day of July, in the year eighteen hundred and sixty-four, have acknowledged the same before me, in the city aforesaid.

27 In witness whereof I have hereto set my hand and affixed my notarial seal this thirtieth day of July, in the year eighteen hundred and sixty-four.

[Seal Leander Warren, Notary Public, Baltimore City, Maryland.]

LEANDER WARREN,
Notary Public.

WEST VIRGINIA:

Office of the recorder of Harrison county.

SEPTEMBER THE 29TH, 1864.

Be it remembered that this deed and the annexed certificate were this day produced in this office and duly admitted to record.

Teste: SIDNEY HAYMOND, *Recorder.*

(Deed Book No. 47, page 14.)

WEST VIRGINIA, *Doddridge County.* }

RECORDER'S OFFICE, *Sept. 30th,* 1864.

The foregoing deed and the annexed certificates were this day presented in the recorder's office aforesaid and admitted to record.

Given under my hand and official seal.

[Seal Doddridge County, West Virginia.]

DANIEL SHERWOOD, *Recorder.*

Deed Book No. 5, page 80.

STATE OF WEST VIRGINIA:

I, George K. Leonard, recorder of Wood county, hereby certify that the foregoing writing, dated 28th day of July, 1864, together with the several certificates thereto annexed, and having U. S. internal revenue stamp denoting one thousand dollars thereto adhering and cancelled, was presented in my office and admitted to record therein on the 1st day of October, 1864, in Deed Book No. 22, page 435.

Teste: G. K. LEONARD, *R. W. Co.*

Copy.
Teste: EDW'D M. HOIT, *R. W. C.*

28 EXHIBIT "E."

This deed made this third day of April, eighteen hundred and sixty-five, between the mayor and city council of Baltimore, of the first part, and the Baltimore and Ohio Railroad Company, of the second part:

Whereas, by a deed of trust from the Northwestern Virginia Railroad Company to the said mayor and city council of Baltimore, dated on the twenty-first day of March, in the year eighteen hundred and fifty-three, the said Northwestern Virginia Railroad Company, in consideration of the guarantee by the said mayor and city council of the bonds or certificates of loan of the said Northwestern Virginia Railroad Company, as is fully set forth in the recitals of the said deed of trust, and under the authority referred to, did grant unto the said mayor and city council all the property of the said Northwestern Virginia Railroad Company of whatever kind, nature and description the same might be, as well that which they at the time actually held, as that which in the prosecution, completion, stocking and working of the said railroad should accumulate thereon, in trust, to secure the payment of the bonds or certificates of loan, with the interest thereon according to their tenor as described in the recitals of the deed of trust aforesaid, to the end, that the said mayor and city council might be saved harmless and indemnified from all loss and injury consequent in any manner upon the guarantee aforesaid; and whereas, the said Northwestern Virginia Railroad Company having failed to pay the interest on the bonds or certificates of loan aforesaid, to the holders thereof, according to their tenor, the said mayor and city council paid the same as they fell due to the holders aforesaid, that is to say: from the semi-annual payment due on the first day of July, eighteen hundred and sixty-one to the thirty-first day of December, eighteen hundred and sixty-four, both inclusive, in consequence of which

29 failure by the said Northwestern Virginia Railroad Company, and consequent payment by the said mayor and city council of Baltimore, the latter became substituted in the place of the holders of the said bonds, or certificates of loan, to the extent of the interest paid as aforesaid, amounting to the sum of three hundred and fifteen thousand dollars, as also the extent of any

other arrears of interest on the account aforesaid, paid by the said mayor and city council of Baltimore; and whereas, the said mayor and city council did, on the twenty-eighth day of July, in the year eighteen hundred and sixty-four, by deed duly executed, and for the consideration therein mentioned, assign, among other things, to the said Baltimore and Ohio Railroad Company all the claim so acquired by the said mayor and city council growing out of the non-payment of the interest aforesaid by the said Northwestern Virginia Railroad Company, and the payment thereof by the said mayor and city council as aforesaid, as will appear by reference to the said deed, recorded in the several counties through which the said Northwestern Virginia railroad passes, so that the said Baltimore and Ohio Railroad Company had become substituted as aforesaid, to sell the property so as aforesaid conveyed by the deed of trust aforesaid; and whereas, the said mayor and city council, trustee as aforesaid, having first given reasonable notice of the time and place of sale by advertisement for more than thirty days in the National Telegraph, published at Clarksburg, in the State of West Virginia, in the Ritchie Press, published at Harrisville, in the State of West Virginia, in the Parkersburg Gazette, published at Parkersburg, in the State of West Virginia, and in the Baltimore American, published in Baltimore, in the State of Maryland, did proceed to sell at public auction for cash, at the hour of noon, on the fifteenth day of February, in the year eighteen hundred and sixty-five, before the front door of the court-house of Wood county, in the town or city of Parkersburg, in said county, all the property of the said Northwestern Virginia Railroad Company, of every kind, nature and description, at the time of said sale (the sale of the whole being necessary because of the indivisibility thereof), and whereas, at the said time and place the said Baltimore and Ohio Railroad Company bid the sum of thirty-two thousand dollars for the property so as aforesaid offered for sale, which was the highest bid therefor, and have since paid the said sum, and thereby become entitled to a conveyance of the said property, wherefore these presents are executed:

Now, this deed witnesseth: that in consideration of the premises, and of the sum last aforesaid, the said mayor and city council of Baltimore, trustee as aforesaid, do grant unto the Baltimore and Ohio Railroad Company, with special warranty, all the property of the Northwestern Virginia Railroad Company, of every kind and description, as well that held by the said company at the date of the deed of trust aforesaid, as that which in the prosecution, completion, stocking and working of the said railroad has been accumulated thereon. To have and to hold the work and property hereby granted and conveyed unto the said Baltimore and Ohio Railroad Company, in trust, for the Baltimore and Ohio Railroad Company and the bondholders, creditors and stockholders of the Northwestern Virginia Railroad Company assenting to the terms set forth in certain proposition to constitute the basis of an agreement between the Baltimore and Ohio and Northwestern Virginia Railroad Companies, bearing date on the twenty-second day of

July, in the year eighteen hundred and sixty-four, authenticated by the signatures of the presidents of the said companies, and by the corporate seals thereof, which said propositions are referred to in, and are made part of a certain agreement between the mayor and city council of Baltimore, and the Baltimore and Ohio Railroad Company, bearing date on the twenty-first day of July, eighteen hundred and sixty-four. And the said Baltimore and
31 Ohio Railroad Company, purchaser as aforesaid, and trustee as hereinbefore referred to, being by force of the twenty-eighth section of the sixty-first chapter of the eighteenth title of the Code of Virginia, second edition, "published pursuant to law" in eighteen hundred and sixty, and now the law of West Virginia, a corporation by any name that may be set forth in this conveyance, does hereby declare that its said corporate name as such purchaser and trustee is "the Parkersburg Branch Railroad Company," and it is hereby declared to be the intent of this conveyance to give the said purchaser by the said title of "the Parkersburg Branch Railroad Company" all the rights, and to subject it to all the obligations, which are described in the twenty-eighth and twenty-ninth sections of the sixty-first chapter of the eighteenth title of the Code of Virginia, second edition, published pursuant to law in the year eighteen hundred and sixty.

Witness the signature of the mayor of the said city, and the seal of the mayor and city council of Baltimore, on the day and year first above written.

[Seal City of Baltimore.]

JOHN LEE CHAPMAN, *Mayor.*

STATE OF MARYLAND, *City of Baltimore,* } *To wit:*

On this third day of April, in the year eighteen hundred and sixty-five, before the subscriber, a notary public of said State in and for the said city, duly commissioned and sworn, personally appeared John Lee Chapman, mayor of the said city, whose name is signed to the writing above, bearing date on the third day of April, in the year eighteen hundred and sixty-five, and acknowledged the same to be the act of the mayor and city council of Baltimore.

32 In testimony whereof I do hereto set my hand and affix my seal notarial the day and year herein first above written.

[Seal Thomas R. Rich, Notary Public, Baltimore, Md.]

T. R. RICH,
Notary Public.

WEST VIRGINIA:

RECORDER'S OFFICE, WOOD COUNTY, *8th April,* 1865.

The foregoing writing, duly stamped and acknowledged, was this day received in said office and, together with certificate of said acknowledgment thereto annexed, admitted to record therein.

Teste: G. K. LEONARD, *R. W. C.*

Copy.
Teste: EDW'D M. HOIT, *R. W. C.*

D. B. 24, folio 189, &c.

EXHIBIT "F."

This deed made this 21st day of December, in the year 1857 between the Northwestern Virginia Railroad Company of the first —, and James Cook, of the town of Parkersburg, who is hereby appointed a trustee for the purposes of this deed, of the second part, witnesseth: That whereas, the said company is indebted to James M. Stephenson, James Cook, Daniel R. Neal, William Logan, Albert G. Leonard, Thomas Chancellor, John Simpson, and William Spencer, in the sum of twenty thousand dollars, as is evidenced by the note of the said company (No. 531) dated January 1st, 1856, and payable three years after date with interest payable semi-annually, the payment whereof, the said company is desired to secure: Now, the said company, in consideration of the premises, and of one dollar to them paid by the said Cook, the receipt whereof is hereby acknowledged, do hereby assign, transfer, and
33 set over to the said Cook, the several sums of money due, or to grow due to them, by reason of subscription to their capital stock made, or payable at Parkersburg, and all their right, title and interest in and to the said subscriptions, and the shares of their said capital stock, subscribed or payable as aforesaid, which has accrued or may hereafter accrue to them by reason of the said subscriptions and the non-payment thereof, and the said company, for the consideration aforesaid, do hereby grant to the said Cook with general warranty, the following lots or parcels of land, to wit: All those eight several inlots situated in the town of Parkersburg aforesaid, on Avery and Green streets, between Washington and Littleton streets, known and numbered on the map, or plat of the said town, now of record in the county of Wood, and State of Virginia, as inlots numbers 132, 133, 134, 135, 136, 137, 138 and 139 (one hundred and thirty-two to one hundred and thirty-nine inclusive) of the said town.

Also so much of outlot No. 16 (sixteen) of the said town as lies to the north of the railroad of the said company, and has heretofore been conveyed, or contracted to be conveyed, to them. Also those two lots or parcels of land situated in the town of Claysville, in the said county, heretofore conveyed to the said company by George Thorp, and others, by deed dated April 5th, 1854, and recorded in the said county. Also that lot or parcel of land situated on Walker's creek, in the said county, heretofore conveyed to the said company by Bushrod W. Creel and wife, by deed dated September 12th, 1853, and recorded in the said county. Also that lot or parcel of land situated in the county of Ritchie and State aforesaid, heretofore conveyed to the said company by Edward Skelton and wife by deed dated August 14th, 1852, and recorded in said county of Ritchie.

But this conveyance is upon trust, that the said Cook will convey to Burton Despard so much of the above-described parcel of outlot No. 16 (sixteen) as is bounded and described as follows, to
34 wit: Beginning on the easterly side of Green street, opposite

the northerly line of Court street, and running thence northerly with said Green street one hundred and seventy and fourtenths feet; thence at right angles to said Green street to the Northwestern Virginia railroad, thence with the same to a projected extension of the said northerly line of Court street; and thence with the same to the place of beginning.

And upon this further trust, that the said Cook will proceed to collect by law or otherwise, the moneys due or to grow due to the said company by virtue of the said subscription to their capital stock and the interest which has accrued, or may accrue thereon, in the name of the said company, or in his own as trustee as aforesaid; and that he will also proceed from time to time to sell by public or private sale, on such terms as to price and credit, and in such parcels as he may deem reasonable, all the lots and parcels of land hereby conveyed, excepting the parcel above directed to be conveyed to the said Burton Despard, and out of the proceeds thereof, and of the rents and profits of the said lands, and of the said collections of stock subscriptions, shall pay, firstly, the expenses of this writ, including the commissions allowed by law to trustees—on the proceeds of the lands sold by him—secondly: the unpaid purchase-money due from the said company on any of lands hereby conveyed; thirdly: the principal and interest remaining unpaid of the above-described note No. 531 of the said company, payable to James M. Stephenson and others as aforesaid; and lastly: pay over the residue, if any, to the said company.

In testimony whereof the said Northwestern Virginia Railroad Company have caused their seal to be affixed and attested by the signature of their president the day and year first above written.

[Seal Northwestern Virginia Railroad Co.]

P. G. VAN WINKLE,
President N. W. Va. R. R. Co.

The Baltimore and Ohio Railroad Company do hereby consent to the above conveyance of the lots and parcels of land therein described and to the sale of the same for the purposes expressed in the said conveyance in the manner therein provided.

In testimony whereof the said Baltimore and Ohio Railroad Company have caused their seal to be hereto affixed and attested by the signature of their president this 24th day of December, in the year 1857.

[Seal Baltimore and Ohio Railroad Company, 1827.]

C. BROOKS,
President B. & O. R. R Co.

STATE OF MARYLAND, *ss:*

I, Joseph T. Atkinson, a commissioner appointed by the governor of the State of Virginia for the said State of Maryland, certify that C. Brooks, whose name is signed to the writing above, bearing date

on this day, has acknowledged the same before me in my State aforesaid.

Given under my hand this 24th day of December, 1857.

JOSEPH T. ATKINSON,
Commissioner for Virginia.

VIRGINIA:

WOOD COUNTY COURT, CLERK'S OFFICE, *29th December*, 1857.

I, Henry H. Dils, clerk of Wood county court, do certify that P. G. Van Winkle, whose name is signed to the foregoing writing, bearing date 21st December, 1857, has this day acknowledged the same before me in my office; and thereupon the said writing, with the consent of the said Baltimore & Ohio Railroad Company and the certificate of Joseph T. Atkinson, commissioner of deeds for Virginia, thereto annexed, is admitted to record in my office.

H. H. DILS, *C. W. C.*

Copy.
Teste: EDW'D M. HOIT, *R. W. C.*

36 This deed made this 24th day of March, 1865, between James Cook, of the county of Wood, and State of West Virginia, of the first part, and the Baltimore and Ohio Railroad Company of the other part: Whereas, the Northwestern Virginia Railroad Company, by a certain deed bearing date the 21st day of December, in the year 1857, and of record in the recorder's office of Wood county, in Book No. 19, pages 158 and 159, did grant unto the said James Cook (among other things) all those eight several inlots situated in the town (now city) of Parkersburg, in said county of Wood, on Avery and Green streets, between Washington and Littleton streets, and known and numbered on the plat of said city as inlots number 132, 133, 134, 135, 136, 137, 138 and 139, (one hundred and thirty-two to one hundred and thirty-nine inclusive), in trust, to secure J. M. Stephenson and others, named in said deed, a sum of money therein fully set forth, now this deed witnesseth: That the said James Cook, in performance of his duties as trustee, and for and in consideration of sixteen thousand, three hundred and thirty-nine dollars to him in hand paid by the said Baltimore and Ohio Railroad Company, the receipt whereof is hereby acknowledged, doth grant unto the Baltimore and Ohio Railroad Company, with special warranty, the eight inlots above named, numbered and described, lying and being in the city of Parkersburg, county of Wood, and State of West Va., to have and to hold unto the company, or its assigns forever.

Witness, the following signatures and seals.

JAMES COOK. [SEAL.]

STATE OF WEST VIRGINIA, }
County of Wood. }

I, H. M. Moss, a notary public in and for the State of West Virginia, in the county of Wood, do certify that James Cook, whose name is signed to the foregoing writing, bearing date the 24th day

of March, 1865, personally appeared before me, in my State
37 and county aforesaid, and acknowledged the same.
Given under my hand this 25th day of March, 1865.

H. M. MOSS,
Notary Public.

WEST VA.:

RECORDER'S OFFICE, WOOD COUNTY, *30th March*, 1865.

The foregoing writing, duly stamped and acknowledged, was this day recorded in said office and, together with the certificate annexed, admitted to record therein.

Teste: G. K. LEONARD, *R. W. C.*

Copy.
Teste: HOIT, EDW'D M., *R. W. C.*

And the defendants being summoned and failing to appear, a decree *nisi* was entered against them in this cause.

And at another day, to wit, at rules held in the clerk's office of said circuit court on the last Monday in March, 1870, the defendants still failing to appear, the bill was taken for confessed and cause set for hearing.

And at another day, to wit, at a circuit court continued and held for Wood county on the 7th day of September, 1870:

The defendants The Baltimore and Ohio Railroad Company this day filed its answer to the complainant's bill, and time is taken by the complainants to reply or demur to said answer.

38 *Answer.*

The separate answer of the Baltimore and Ohio Railroad Company to a bill in chancery exhibited against itself and others in the circuit court of Wood county, in the State of West Virginia, by William H. Mattingly, of said county.

This respondent, saving and reserving to itself now and at all times hereafter all just exceptions to the manifold and manifest uncertainties, imperfections, and untruths in the said bill contained, for answer, nevertheless, thereto or unto so much thereof as it is advised — material or necessary for it to answer thereto, answering, s-eth:

That it is true the said Northwestern Virginia Railroad Company was incorporated by an act of the General Assembly of Virginia, passed on the 14th day of February, 1851, for the purpose of constructing a railroad through a portion of the then State of Virginia, as stated in the bill; that said act was entitled "An act to incorporate the Northwestern Virginia Railroad Company," and said company was to construct its road from Parkersburg to some convenient point on the road of this respondent at or near the mouth of Three Fork creek; that it is true said railroad lies wholly within the State

of West Virginia, as stated in the bill, and passes from Parkersburg, on the Ohio river, through the counties of Wood, Ritchie, Doddridge, and Harrison to a point on the road of this respondent within the county of Taylor at the mouth of said creek.

That the complainant was a contractor on said railroad, did considerable work from time to time, and that said company became largely indebted to him are matters not within the knowledge of this respondent and which, therefore, it can neither admit nor deny, and calls for proof thereof, if material.

Respondent believes it to be true, as stated in the said bill, that said railroad company, to raise money for the completion
39 and equipment of its road, was compelled to execute, or certainly did execute, certain liens upon all its property of every description, as well that held at the time thereof as also what, with the prosecution, stocking, completion, and working of said road, should — accumulated thereon.

That the first in order of priority of the incumbrances was the deed, called in the bill mortgage No. 1, bearing date the 21st day of March, 1853, and which was intended to secure the payment of bonds to be issued by said company and to indemnify the city of Baltimore as the grantor of the same to the amount of one million five hundred thousand dollars; said deed was duly acknowledged for and on behalf of said company, said acknowledgment duly certified, and the same was duly admitted to record in the office of the clerk of the county court of Wood county on the 24th day of March, 1853, and is the same of which a copy is exhibited in the bill.

That the second in order or priority of these securities was the deed styled in the bill "mortgage No. 2," executed by said company to secure the payment of bonds to be issued by said company and, in effect, to indemnify this respondent or the grantor of the same to the amount of one million dollars, and is the same of which a copy is exhibited with the said bill. Said last-named deed, though executed and admitted to record on the same days as the said deed to indemnify the said city of Baltimore above mentioned, yet — its terms — declared to be subject to the deed for the benefit of said city, the preference of which as a lien on said property is thus actually recognized and guaranteed.

That it is also true the said company did also execute to the said James Cook as trustee the deed in the bill mentioned, and the same bearing date on the 1st of January, 1855; a copy thereof is exhibited with the bill for the purposes therein expressed and which were admitted to record on the 25th day of June, 1855.

40 Respondent, further answering, saith that either the complainant is the owner of and has in his possession bonds of the said Northwestern Virginia Railroad Company with coupons attached or, if complainant has in his possession papers purporting to be such bonds, whether the same are valid bonds of said company are facts not within the knowledge of this respondent, and, as the complainant has not chosen to exhibit the alleged bonds and coupons with his said bill, but has thought proper to withhold the

same and contented himself with an offer to exhibit the same to the court at any time he may be directed so to do, so that no opportunity is offered to examine the same, respondent doth not admit that the said papers are the valid bonds and coupons of said company, or that the said complainant is the holder of the same, but calls for proof thereof; and, for the same reason, respondent doth not admit that the said papers (whatever they may be) are secured by the said deed styled in the bill "the third mortgage," or that they constituted a valid or binding lien upon the said road or any of the property that belonged to it, but calls for proof thereof. Further answering, respondent saith that it is true, as stated in the said bill, that the mayor and city council of Baltimore did execute to the respondent a deed of assignment, bearing date on the 28th day of July, 1864, by which they did assign to this respondent all the benefit of said deed executed for the security of said city and of all other bonds and obligations which it held on said Northwestern Railroad Company, thereby placing this respondent in its shoes and investing it with all rights to which it was entitled under the same and subject to the provisions and with the exceptions in said deed of assignment expressed, this deed having been duly acknowledged and duly admitted to record on the 1st day of October, 1864, in the county of Wood, after it had been recorded in other counties, and is the same of which a copy is exhibited with the bill as part thereof.

41 Respondent admits that the mayor and city council of Baltimore did make sale of all the property of the Northwestern Virginia — conveyed to them on the 15th day of February, 1865, at public auction, under authority of the deed of the said 21st of March, 1853, and the same was bid in in the name of this respondent at the sum of $32,000, as charged in the said bill, previously to said sale—that is to say, on the 21st day of July, 1864, certain propositions for the transfer of the interest of the city of Baltimore as guarantor and creditor in the Northwestern Virginia railroad had been ratified and agreed — by and on the part of said city and this respondent, a copy of which is herewith exhibited as part hereof, marked "Z." These propositions contemplated an agreement between this respondent and the said Northwestern Virginia Railroad Company on the basis of certain propositions thereto annexed, which were subsequently ratified and agreed to on the 22nd day of July, 1864, by and on the part of this respondent and the said Northwestern Virginia Railroad Company, and respondent herewith exhibits a copy of the same as ratified as aforesaid, marked "Y," and prays that the same may be taken as part hereof. This agreement, as will be seen, provided for a reorganization of the Northwestern Railroad Company and recapitalization of its indebtedness upon the laws and principles therein fully expressed, and, amongst other things, as will be seen, provided a means by which something might be saved to the holders of the unendorsed bonds of said company and contractors' final-estimate bonds and all other creditors of said company, as well as the stockholders thereof who would accept the terms thereby proposed. The condition of said company was that of hopeless and incurable

insolvency, and the debts secured by the first and second mortgages would necessarily, if executed by sale of the property and works of said company, absorb the whole and yet leave a large portion of said indebtedness unsatisfied; nor was there any possibility that
42 as affairs then stood any stockholder—any creditor other than those secured by the said first and second mortgages—could realize a dollar of their demands, and it was only thought an arrangement of this character, conceded in a spirit of liberality on the part of the city *and* Baltimore and this respondent, that anything whatever could be saved from the general wreck to the stockholders and the class of creditors referred (to). Carrying out this arrangement, the Northwestern railroad, on the 28th of September, 1864, issued a circular to its stockholders and the class of creditors alluded to, inviting their acceptance of the terms proposed. A copy of said circular is herewith exhibited as part hereof, marked "X." This was generally circulated and made known to the parties interested and the matter thereof published at large. The time within which its terms might be accepted was extended and ample opportunity given to those concerned to avail themselves of the offer, if they chose to do so. Many of the creditors and stockholders did accept the terms offered and did surrender their certificates of stock and evidence of indebtedness and received certificates of stock in the reorganized company at the rate proposed, but as some of the bondholders, creditors, and stockholders stood out and failed to accept the terms proposed it became necessary and proper, in conformity to the fifth article of the agreement between the two companies of the 22nd of July, 1864, that a sale of the property and works of the Northwestern railroad should be made for the purpose of carrying out said arrangement, and the same was accordingly made by the said mayor and city council of Baltimore, as trustees under the deed to them, with the consent of the said Northwestern Virginia Railroad Company and after reasonable notice had been given of the time and place thereof, as required by law; and at said sale this respondent became the purchaser thereof in trust for the benefit of itself and the stockholders, bondholders, and other
43 creditors who had assented to the terms so proposed as aforesaid, and the same having been conveyed to this respondent by the name set forth in said conveyance of "the Parkersburg Branch Railroad Company" is now held by this respondent in that name for the joint benefit of itself and the others entitled to shares of the stock thereof, as aforesaid. Said conveyance is the same of which a copy is exhibited with the bill, marked "E," as part thereof.

Respondent doth not admit that the said mayor and city council of Baltimore had no authority to make said sale and deed, and that the same are void, and that no title passed under said deed to this respondent, as charged in the said bill. On the contrary, it insists that the said parties were authorized to make said sale and deed under the conveyance to them and under the law of the State of West Virginia, and that the same are valid and effectual and pass comple- title to the property and works of said Northwestern Railroad Company to this respondent. For the purposes above

mentioned respondent admits that, the effect of said conveyance to said mayor and city council being to secure the bondholders as well as itself as endorser, the legal title to the property passed to and vested in them for the purposes of the trust and by their conveyance to this respondent passed to and became vested in it, and that, as at the time of the said sale the said mayor and city council had no interest in the subject, *it* having transferred their entire interest to this respondent by the deed of the 28th of July, 1864, executed in conformity to the arrangement above mentioned, and as said sale was made with the consent of the said Northwestern Virginia Railroad Company after due and lawful notice thereof and is in all respects fairly made, respondent insists that the title acquired under the same is unimpeachable in equity as it is at law. In short, respondent submits and insists that said conveyance to said mayor and city council was in legal effect not a mortgage but a deed
44 of trust for the benefit of the bondholders directly and principally and only for the benefit of the grantee incidentally; that it was in the form of a deed, to which the law attaches a form of sale and provides for the mode of its execution; that it lacks the most material elements of a mortgage, and it must be presumed the parties intended the power to sell to coexist; that the legal title, being in the grantees, passed by their deed to the respondent, and that there was no such interest in the said mayor and city council at the time of making said sale nor any other reason or circumstances attending the same as would render it proper for a court of equity to disturb the same, and more especially as the same was made publicly, without objection from any creditor and other grantor, and has remained without question from the time it was made down to the time of the present suit, during which time respondent has, in confidence of a perfect title, expended many hundreds of thousands of dollars in arching the tunnels upon said road and otherwise completing the same and fitting it for successful working, and has also engaged in the great and costly enterprise of constructing a bridge across the Ohio river for the purpose of connecting the said Northwestern railroad, and thus filling up that important gap in this great line of intercommunication between the East and the West.

This respondent, further answering, saith that it doth not admit the allegation to be true that said deed conferred a mere benefit not coupled with a power, but insists that from the frame and structure of said deed and by force of the statute on the subject the power to sell must have been extended by the parties and did attach by operation of law, and that when the same was executed by the sale and conveyance to this respondent it became effectual to transfer the title to the property to this respondent, both at law and in equity, whatever might be the effect upon those claiming debts se-
45 cured by the third mortgage (so called), as supposed in the bill.

Further answering, this respondent saith that (it) is true the said Northwestern Railroad Company was possessed of valuable real estate situated in the county of Wood, and that it did execute

and cause to be recorded the deed of conveyance to the said James Cook as trustee, bearing date on the 21st of December, 1857, for the purposes therein expressed, as in the bill stated. It is also true that said deed of trust is subsequent in point of date and of record to the other three deeds in the bill specified, and that the property named is subject to the debts respectively secured by said deeds in the order of their priority as ascertained by law. It is also true that this respondent did endorse upon said deed to the said Cook as trustee its consent to the same and to the sale of the property therein described for the purposes therein expressed and in the answer therein provided, and that said endorsement, called in the bill "a release," was recorded with the said deed and bearing date on the 24th day of December, 1857, three days after the date of the said deed to the trustee, Cook, as stated in the bill; but it is not true, as mistakenly stated in the bill, that at the time of making said endorsement this respondent was the holder and owner of the first two of said mortgages (meaning the deed executed to the mayor and city council of Baltimore, of the 21st of March, 1853, and that of the same date executed to this respondent), as stated in the said bill. Respondent alleges the fact to be, to the contrary thereof, that at the time of making said endorsement it was not the owner nor had any interest in the said conveyance to the said mayor and city council of Baltimore (styled in the bill the first mortgage) and did not become such owner or acquired any interest in the same until the arrangement in the year 1864 above mentioned, consummated by the said deed of
46 assignment of the 28th of June, 1864. Whatever, therefore, might be the effect of said endorsement ("styled in the bill a release") upon the rights of this respondent under the deed made for its security by way of release or others, which this respondent submits to the judgment of the court, it is certain — did not and would not have any effect upon the rights of those claiming under the deed to the mayor and city council of Baltimore, nor upon those acquired by this respondent under the assignment made to it some six years and upwards later by the deed of the 28th of June, 1864. Respondent therefore denies that the said endorsement operated any release or postponement of the liens created by the deed to the mayor, &c., of Baltimore, or that the said trust deed to Cook acquired or could possibly acquire thereby any preference or priority to it, and insists that the priority of said liens of the mayor, &c., of Baltimore remained wholly unaffected thereby and passed with the subsequent assignment to this respondent.

Further answering, respondent saith that it is true the said James Cook, trustee as aforesaid, did advertise the property conveyed by said trust, proceed, and did sell the same according to the terms and requirements of said deed, and that this respondent became the purchaser thereof at the sum of $16,339, and that the same was conveyed to this respondent by the said Cook by the deed a copy of which is filed with the bill. Whether said property was worth more than said sum at the time of said sale or whether if sold in parcels it would have sold for more than the amount brought this respondent is not at this time prepared to state. It was a public

sale, fairly made, and in a manner authorized by the deed, and respondent was the highest bidder, and the property was accordingly struck off at its bid. Respondent therefore claims the benefit of said sale and relies upon the said deed and denies that there is any ground whatever for disturbing the same; but whatever
47 might be the equities as between those claiming under said trust deed and those claiming under what is called in the bill the third mortgage, yet certainly all the rights of both these classes of creditors are subordinate to those acquired under the deed to the mayor, &c., of Baltimore, by virtue of which the sale was made through which this respondent acquired the paramount title to said property, including the lots and parcels of land embraced by the deed to Cook of the 21st of December, 1857, as heretofore explained.

Respondent therefore denies that the title to said lots or parcels of land is subject or subordinate to the claim of complainant (whatever it may be) or to that of any of the beneficiaries in the said third mortgage, so called, and insists that it is inferior and paramount to them all, and denies the right of the complainant, on this or any other ground, to ask the intervention of this court in the premises. Following the recapitulation of the bill therefor, respondent denies that the sale of the property and works of the Northwestern Virginia Railroad Company to this respondent was null and void or in any manner illegal for the reasons stated in the said bill or for any other whatever, but, on the contrary, insists that the same was a legal and valid sale, and that the deed made to this respondent in consummation thereof passed the legal title to the property therein mentioned to this respondent, and that no cause whatever exists for the interference of the court of equity to disturb the same; and, secondly, respondent denies that the sale made by the trustee, James Cook, under the deed of trust to him conveyed the same property subject to the lien of that and called "the first and second mortgages," meaning the deed for the indemnity of the stockholders whose bonds were guaranteed by the city of Baltimore, and that for the indemnity of this respondent, and denies also that the lien of the first of these deeds was in any manner affected by the memorandum of this respondent at the foot of said deed of trust, whatever may be, in the
48 opinion of the court, its effect upon the lien created by the deed in favor of this respondent, and consequently denies that the said third mortgage, so called, has in that way or in any other manner whatever acquired priority or preference to the lien created by either the first or the second of the two mortgages, so called, in the bill, for the respondent insists that at the time of making said memorandum this respondent was in no manner interested in the first of said deeds, called the first mortgage, with the lien created thereby, and that no act of this respondent could in any manner affect the claimants under said first deed or the lien created thereby; and, secondly, that it was competent for this respondent, by its memorandum of the 24th of December, 1857, endorsed on the deed to Cook, as trustee, of the 21st of that month, to

give to the claimants under that deed the benefit of its prior lien on the said property therein mentioned, if it saw proper so to do, without thereby releasing its lien in favor of those claiming under the third mortgage, so called, in any manner or in anywise improving the grade of the lien to which they were entitled, and that consequently by the deed of the trustee, Cook, to this respondent of the 21st of March, 1865, title passed to this respondent superior to the lien of those claiming under the said third mortgage, so called.

By way of illustration of the indebtedness of the said Northwestern Railroad Company to this respondent referred to in the agreement between the two companies, of the 22nd of July, 1864, respondent would have stated that, the Northwestern Railroad Company promising to be a most important adjunct and feeder to the road of this respondent, respondent was induced to make large advances to said company with a view to promote the construction of said road prior to the year 1865, and these advances were continued and increased in the subsequent years, and thus by payment of interest on its bonds and otherwise the said Northwestern road became largely indebted to this respondent, and this indebtedness
49 increased from year to year until in the year 1865 it had attained the large sum of $5,680,684.94. Respondent files a statement of the indebtedness of said company to this respondent, taken from respondent's books, in the several years aforesaid, which it prays may be taken and reckoned as part hereof. Respondent also exhibits in connection herewith copies of the contracts between said company and the respondent providing for the working of said road by this respondent, under which the same was worked and operated and worked from 1857 down to the time of the sale of the same under the said deed to the mayor and city council of Baltimore, which it also prays may be taken and received as part hereof.

This respondent submits to the court and calls attention to the fact that neither the said mayor and city council of Baltimore nor the said James Cook are named as defendants or parties in this cause, nor is any reason assigned in the bill why they are not made such parties, and this respondent demurs to said bill for want of proper parties to the same and prays that it may have the same advantage of their objection as if made by formal demurrer.

Respondent denies all fraud, combination, and confederacy and, having fully answered, prays to be hence dismissed with its costs on this behalf unjustly sustained, and for verification hereof respondent hath caused this its answer to be signed by its president and its corporate seal to be affixed.

JOHN W. GARRETT, *President.*

STATE OF MARYLAND, } *To wit:*
City of Baltimore, }

I, undersigned, George F. Thompson, a justice of the peace in and *and* for the city aforesaid, in said State, do certify that John W. Garrett, president of The Baltimore and Ohio Railroad Company, the defendant named in the foregoing answer, being duly

sworn, saith the facts and allegations therein contained, so
50 far as they are stated on his own knowledge, are true, and that so far as they are stated on representation he believes them to be true.

JOHN W. GARRETT.

Taken, sworn, and subscribed before me this 23rd day of August, 1870.

GEORGE F. THOMPSON, *J. P.*

EXHIBITS WITH ANSWER.

"EXHIBIT Z."

BALTIMORE, *July 18th*, 1864.

With a view to close the negotiations heretofore pending for a transfer of the interest of the city of Baltimore as grantor and creditor in the Northwestern Virginia Railroad Company, I submit the following propositions as the basis of a more formal contract to be hereafter prepared and executed as therein provided:

Propositions.

1st. The city of Baltimore to transfer to the Baltimore and Ohio Railroad Company, in such mode and form as shall be determined by the counsel of the respective parties, all benefit of the first mortgage of the works and property of the Northwestern Virginia Railroad Company, and all claims of the said city, of whatever nature, against the said last-mentioned company, so that on the completion of the transfer the Baltimore and Ohio Railroad Company will have the same claims, rights and demands against the Northwestern Virginia Railroad Company as the city now has.

2nd. The said city to indemnify the Baltimore and Ohio Railroad Company against all claims and demands arising out of the bonds of the latter company guaranteed by the city, including the interest thereon which matured on the first day of July, 1856, or on the first day of July, 1861, or subsequently thereto, or which may hereafter mature or accrue. The said city also undertakes
51 to pay the said bonds when they mature, and the interest matured, or hereafter to mature or accrue thereon as aforesaid; the said city to agree to transfer and assign to the Baltimore and Ohio Railroad Company, besides the said mortgage, all bonds, notes or other obligations or securities of the Northwestern Virginia Railroad Company now held by the said city, or which the said city is now entitled to claim or hold, excepting $25,000 of the coupon bonds of the Union railroad.

3rd. On the execution on the part of the said city of the necessary papers and assignments (which are to be prepared under the direction of the counsel of the respective parties as aforesaid,) the Baltimore and Ohio Railroad Company to pay to the said city the sum of one million two hundred thousand ($1,200,000) dollars as

follows: Two hundred thousand ($200,000) dollars in hand; five hundred thousand ($500,000) dollars on or before the 18th day of September next, without interest, and the remaining five hundred thousand (500,000) dollars on or before the sixth day of October next, with interest from the 18th day of July, instant, to the date or dates of payment. On the completion of these payments, the formal assignment and manual transfer and delivery of the said first mortgage and all benefit thereof, and of the said notes, bonds, obligations and securities to be made to the Baltimore and Ohio Railroad Company.

4th. Upon the completion of the transfer mentioned in the first proposition, the Baltimore and Ohio Railroad Company to enter into an agreement with the Northwestern Virginia Railroad Company on the basis of the accompanying propositions (marked A).

5th. If the foregoing propositions are assented to by the city of Baltimore and the Baltimore and Ohio Railroad Company, this paper is to be signed on the part of each of the said parties by an officer or officers thereof, duly authorized thereto, and thereupon placed in the hands of said counsel, who shall forthwith pro-
52 ceed to prepare the necessary papers, assignments, &c., which shall be formally executed by the proper parties without avoidable delay.

In witness of the assent of the mayor and city council of Baltimore and the Baltimore and Ohio Railroad Company to the foregoing propositions, the mayor and commissioners of finance of the said city and the president of the Baltimore and Ohio Railroad Company, duly authorized thereto by their respective corporations, have hereunto affixed their signatures this 21st day of July, in the year 1864.

JOHN LEE CHAPMAN,
F. LITTIG SHAFFER,
EVAN T. ELLICOTT,
Commissioners of Finance.
JOHN W. GARRETT,
President Balt. & Ohio Railroad Co.

EXHIBIT "Y."

Propositions to Constitute the Basis of an Agreement Between the Baltimore and Ohio and the Northwestern Virginia Railroad Companies.

1st. Upon the completion of the transfer contemplated in the accompanying propositions, of the interest of the city of Baltimore, in the Northwestern Virginia Railroad Company, to the Baltimore and Ohio Railroad Company, the latter company is to release to the former all their interest in the first and second mortgages or deeds of trust of the works and property of the Northwestern Virginia Railroad Company, so as to extinguish the same, so far as they legally may, and to undertake and agree to pay at maturity the bonds of the Northwestern Virginia Railroad Company, guaranteed by the Baltimore and Ohio Railroad Company, and the in-

terest which has accrued thereon, since the first of January,
53 1857, or may hereafter accrue thereon. The Northwestern Virginia Railroad Company to issue to the Baltimore and Ohio Railroad Company certificates of ownership of the capital stock of the Northwestern Virginia Railroad Company for the following, dollar for dollar:

1. For the sum of one million two hundred thousand dollars ($1,200,000) to be paid by the Baltimore and Ohio Railroad Company to the city of Baltimore, as provided in the accompanying propositions, in consideration of the transfer above mentioned, (by this the Northwestern Virginia Railroad Company have the benefit of the difference between this sum and their whole liability to the city, understood to be upwards of $1,900,000).

2. The amount of second and third mortgage bonds guaranteed by the Baltimore and Ohio Railroad Company, amounting to one million five hundred thousand ($1,500,000) dollars.

3. All other liabilities for advances to, and claims and demands against the Northwestern Virginia Railroad Company, of the Baltimore and Ohio Railroad Company, less the receipts and collections made, or to be made by the latter for account of the former company, or such balance as shall appear to be due from the Northwestern Virginia Railroad Company, upon a fair adjustment of the accounts between them, including interest to the first day of January, 1865, upon all transactions, said accounts to be stated with half-yearly rests, commencing on the — day of January, 1857, with the option to the latter company of adopting for said accounts the semi-annual periods of their fiscal year.

2nd. Upon the issue of the said stock certificates the Baltimore and Ohio Railroad Company to surrender to the Northwestern Virginia Railroad Company to be cancelled, all notes, bonds and other obligations, securities and evidences of debt of the latter,
54 now held by the former, whether as collaterals or otherwise, or which the former is now entitled to claim or hold.

3rd. The Northwestern Virginia Railroad Company to issue to the holders of their third-mortgage unguaranteed, contractor's advance, and contractor's final-estimate bonds, and to all other creditors of that company who will accept the same in full satisfaction of their respective claims or demands, and surrender to the said company to be cancelled, the bonds or other evidences of debt held by them respectively, certificates of ownership of the capital stock of the said company to the amount of fifty per centum of the principal of their respective claims or demands, and of the interest due thereon and remaining unpaid on the first day of January, 1865; and also to issue to the present stockholders of their company, their heirs and assigns, whose stock is fully paid up at the time of such issue, and who will accept the same and surrender to said company to be cancelled, the stock certificates now held by them respectively, or to which they are or may be entitled, fifty per centum of the par value of the stock owned by them respectively as aforesaid; but only such bondholders, creditors and stockholders as shall signify their assent to the terms of this proposition on or before the first

day of November next, shall be entitled to the benefits of the arrangement herein proposed.

4th. The stock issued to the Baltimore and Ohio Railroad Company to be preferred, and that issued to bondholders, creditors and present stockholders to be common stock; that is to say, the net earnings of the Northwestern Virginia Railroad Company to be applied first to the payment of dividends at the rate of six per centum yearly, and every year upon the preferred stock, and any surplus of such earnings remaining after the full payment of such dividends, to the payment of dividends upon the common stock;
but if in any year the said surplus exceeds six per centum
55 upon the common stock (the dividends upon the preferred stock being fully paid) the excess to be applied, by way of sinking fund or otherwise, to the reduction of the debt to be incurred as hereinafter provided for the completion and improvement of the Northwestern Virginia Railroad Company.

5th. If a sufficient number of the bondholders, creditors and stockholders mentioned in the two next preceding propositions do not assent to the terms proposed, within the time mentioned, the Northwestern Virginia railroad to be offered for sale, under one or more of the mortgages, in order to effect the purposes of the next proposition. In the event of such a sale, the Baltimore and Ohio Railroad Company to become the purchaser thereat, either by themselves, or by a person or persons appointed by them for the purpose, of all the works and property of the Northwestern Virginia Railroad Company at a sum not exceeding, unless at their option, the amount secured by the first and second mortgages. In any case the purchaser or purchasers to hold the same in trust for the Baltimore and Ohio Railroad Company, and the bondholders, creditors and stockholders assenting to the terms above proposed, until new stock can be issued in conformity with the foregoing propositions, when such purchaser shall transfer the said works and property to the reorganized company.

6th. When a reorganization of the Northwestern Virginia Railroad Company, and a capitalization of its indebtedness, as proposed as above, is effected, with or without a sale, the reorganized company to raise money by a loan or loans, secured by one or more mortgages or deeds of trust upon their works and property to an amount sufficient to complete in a substantial manner the line of their railroad, including the walling and arching of their tunnels, the renewal of the track, the construction of additional sidings, and whatever may be necessary to place the whole in good and efficient
working condition, and also, should the Baltimore and Ohio
56 Railroad Company elect to transfer to the reorganized company, with the consent of the Marietta and Cincinnati Railroad Company, their interest in the contract for building a bridge over the Ohio river at Parkersburg, a sufficient sum to defray the proportion of the cost of such bridge undertaken by the Baltimore and Ohio Railroad Company.

7th. From and after the proposed transfer by the city of Baltimore to the Baltimore and Ohio Railroad Company until the pro-

posed reorganization is effected, the said company to keep the Northwestern Virginia railroad in good working order, and in operation, under their management and control as at present, and to collect and receive the earnings or revenues thereof; any excess of expenditures for this purpose over receipts to be reimbursed by the reorganized company, and any excess of receipts over such expenditures to be paid over to the same. All expenditures or costs properly incurred in effecting the reorganization to be advanced and paid by the Baltimore and Ohio Railroad Company, and reimbursed by the reorganized company.

8th. The signatures of authorized officers of the two companies to these propositions to be binding on their respective companies until formal agreement is prepared and executed.

In witness of the assent of their respective companies to the foregoing propositions, the president- of the Baltimore and Ohio and the Northwestern Virginia Railroad Companies, being duly authorized thereto, have hereunto affixed their signatures this 22nd day of July, in the year 1864.

JOHN W. GARRETT,
President Balt. and Ohio Railroad Co.
P. G. VAN WINKLE,
President N. W. Virginia Railroad Co.

We, whose names are hereunto subscribed, do hereby severally assent to the terms of the agreement between the mayor and
57 city council of Baltimore and the Baltimore and Ohio Railroad Company, a copy whereof is hereunto annexed, and do hereby, with a view to the reorganization of the Northwestern Virginia Railroad Company in the manner proposed in the said agreement, several(ly) promise and agree to surrender to the said last-mentioned company to be cancelled the bonds, stock, certificates, and other evidences of debt against the said company held by us respectively upon the issue to us of certificates of ownership of the capital stock thereof at par and unpreferred in the proportions of our respective demands or claims, in the ratio of fifty per centum thereof, provided in the said annexed agreement.

"EXHIBIT X."

Northwestern Virginia Railroad.

Agreement of Capitalization.

Circular.

OFFICE N. W. VIRGINIA RAILROAD CO.,
PARKERSBURG, W. VA., *Sept.* 28, 1864.

To the holders of unendorsed bonds, other creditors, and stockholders of the Northwestern Virginia Railroad Company:

You are respectfully referred to the annexed copy of an agreement between the City of Baltimore, represented by the commissioners of finance, and the Baltimore and Ohio Railroad Company, which

provides for an agreement to be entered into between that company and this, for the details of a plan proposing a reorganization of this company on such terms as will insure the speedy completion and thorough repair of their road.

That a reorganization, on a plan which will save something for every creditor and stockholder, is possible, is owing to the liberality of the parties to the above-mentioned agreement. As the holders, respectively, of the first and second mortgages upon the road
58 as indemnity for their guarantees of its bonds, now amounting, with accrued interest, to upwards of three millions of dollars, each of them have for three years past had it in their power to enforce a sale of the property of this company. But, although their liabilities have been constantly increasing by the necessity of providing for the payment of the accruing interest on the bonds, they had guaranteed, they have forborne to resort to a measure which must inevitably render the claim of every other creditor and every stockholder worthless.

This forbearance is the more creditable, as the road, their only security, has been deteriorating from year to year; there have been no funds applicable to its adequate repair, to the completion of the tunnels, and other unfinished work along its line, or to those improvements which are necessary to place the great route, of which it is a part, on at least an equality with competing routes between the East and West.

This state of things could not be permitted to continue, the two guaranteeing corporations, who in common with the original stockholders, and probably a majority of the bondholders, had aided the enterprise at its inception, and subsequently, not with the expectation of direct gain from the liability assumed or money invested, but because it was calculated to promote the prosperity of the whole region which would become tributary to it, including the cities at its termini, saw that the latter object would be not merely temporarily, but permanently defeated, unless extraordinary measures were resorted to, the company in charge of the connecting railroad in Ohio, had effected a reorganization similar to that now proposed, and were prepared to complete and greatly improve their own road and to extend its connections. They properly demanded, that what they had effected should be met by corresponding efforts on this side of the Ohio river, as they would otherwise
be under the necessity of seeking an eastern connection
59 elsewhere. These considerations inaugurated the negotiations, the result of which is seen in the annexed papers. The City of Baltimore, in consideration of the sum of one million two hundred thousand dollars, which has been paid to her by the Baltimore and Ohio Railroad Company, agrees to pay the bonds endorsed by her at maturity, and the interest as it accrues, guaranteeing this company against all liability for either, and releasing them from all indebtedness to herself for interest heretofore paid, and other advances. The whole amounts to more than one million nine hundred thousand dollars, and the parties agree that the seven hundred thousand dollars absolutely relinquished by the city, shall

inure to the benefit of the reorganized company. The Baltimore and Ohio Railroad Company also agree to pay the bonds endorsed by them, equal in amount to those endorsed by the city, as they mature, and the interest as it accrues, likewise guaranteeing this company against liability for either. For the amount of these bonds, for the sum just paid the city in cash, and for the large balance due them, mainly for cash advances, they further agree to accept preferred stock of the proposed reorganization at par, thus clearing the road of the first and second mortgages, and one-half of the third. The two corporations further stipulate, that the holders of the unendorsed bonds, and all other creditors of the company, shall be offered common stock of the reorganized company, at par, to the amount of fifty per centum of their respective demands, including interest to the first day of January next, on the surrender to be cancelled of their evidences of debt; and that the present stockholders shall be offered fifty per centum of the par value of the stock held by them, in like stock of the reorganized company on the surrender to be cancelled of the certificates held by them. Those interested are required to signify their intention to accept these offers on or before the first of November next.

60 By the above arrangement, the liabilities including stock of this company, will be reduced from upwards of seven and a half million of dollars to about six millions, a sum not exceeding the actual cost of the road at its opening in May, 1856, including interest paid to that time. Large sums properly chargeable to construction, have been expended in permanent improvements. The aggregate cost of these is estimated to be more than equal to the present deterioration of the track, &c., so that the new stock will be intrinsically worth at least its par value.

It will be observed that the agreement provides, that if a sufficient number of bondholders, creditors and stockholders do not signify their intention to accept what is offered them by the first of November next, the road is to be sold under one or more of the mortgages, and to be purchased, if the bids do not exceed a certain limit, by, or under the auspices of the Baltimore and Ohio Railroad Company, in such manner that the purchase may enure to the benefit of that company, as principal creditor and the other parties assenting, such a provision is necessary in order to prevent the scheme being defeated by a few who might otherwise expect, by withholding their assent, to obtain better terms for themselves. It is certain that if such a sale is made within the limit, no dissenting bondholder, creditor or stockholder will have the slightest chance of recovering one cent of his demand. The only chance they now have is by assenting in time, and for this they will be indebted to the liberality of the city of Baltimore and the Baltimore and Ohio Railroad Company.

Those who now compose the board of the Northwestern Virginia Railroad Company, have, with one exception, been members of it since the city of Baltimore and her citizens became interested in the work. When it became known that the funds provided at the

outset for its construction would prove inadequate, their duty
61 to those who invested in it was plain and simple, namely: to give value to such investments by getting the road completed and opened with the least possible delay. When the opening was met by three successive short crops in the West, and after a short interval, its operation was impeded by the disasters of a civil war, there was but one policy for them to pursue, namely: to keep the road open and in repair, thus as far as possible preserving what was the only security of every creditor; more than three years ago they became convinced that the rapid and heavy accumulation of interest would eventually nullify their efforts in this behalf, and that the security would soon cease to be available for any but those interested in the first and second mortgages, and perhaps not sufficient for them. They then saw that a reorganization upon the principles successfully adopted by other corporations would alone save anything for the unsecured bondholders, creditors and stockholders; to effect this was the next direction of their efforts, of which the plan now submitted is the result.

Believing that it offers to those whom this circular is addressed, more than could, until very recently, have been expected, and more than can otherwise be obtained, they do not hesitate to recommend its acceptance by all interested.

Papers, of which a copy is subjoined, will be left for signatures until the first of November next, at the office of the company in Parkersburg, and at the office of Messrs. Despard and Maxwell in Clarksburg, West Virginia; and in Baltimore with John D. Crawford, secretary, at the office of Messrs. Alexander Brown & Sons, and with J. J. Atkinson, treasurer, at Camden station. Those who cannot conveniently attend at either of the places named may sign the accompanying paper, and forward it by mail or otherwise to the president at Parkersburg, or the secretary at Baltimore. Stock-
holders residing in Baltimore who have not received their
62 certificates can obtain them by calling on the secretary by the 15th of October.

By order of the board.

P. G. VAN WINKLE, *President.*

The Northwestern Virginia Railroad Co. in ac. with Baltimore & Ohio R. R. Co.

General Annual Bal. Statement.

1855.			
Sept. 30.	To notes of N. W. Virginia R. R. Co. for loans, &c.....		210,000 00
1856.			
Sept. 30.	" notes of N. W. Va. R. R. Co. for loans, &c.	491,982 42	
" "	To book ac. " " "	91,030 00	
			583,012 42
1857.			
Sept. 30.	Notes of N. W. Va. R. R. Co. for loans, &c....	476,982 42	
" "	Book ac. " "	625,701 57	
			1,102,683 99
1858.			
Sept. 30.	Notes N. W. Va. R. R. Co. for loans, &c.....	476,982 42	
	Book ac. " "	996,813 32	
			1,473,795 74

1859.				
Sept. 30.	Notes N. W. Va. R. R. Co. for loans, &c.....	476,982 42		
	Book acc't.....	1,318,343 87		
				1,795,326 29
1860.				
Sept. 30.	Notes of N. W. Va. R. R. Co. for loans, &c...	476,982 42		
	Book acc't.....	1,603,703 38		
				2,080,685 80
1861.				
Sept. 30.	Notes N. W. Va. R. R. Co. for loans, &c.....	476,982 42		
	Book acc't.....	1,862,764 99		
				2,339,747 41
1862.				
Sept. 30.	Notes N. W. Va. R. R. Co. for loans, &c.....	476,982 42		
	Book acc't.....	2,011,549 83		
				2,488,532 25
1863.				
Sept. 30.	Notes N. W. Va. R. R. Co. for loans, &c.....	476,982 42		
	Book acc't	2,220,560 54		
				2,697,542 96
1864.				
Sept. 30.	Book acc't N. W. Va. R. R. Co.....			4,054,515 25
1865.				
Sept. 30.	This am't due to date.....			$5,680,684 94

63 *Articles of Agreement Between the Northwestern Va. Railroad Co. and the Baltimore and Ohio Railroad Co. Referred to in Bill.*

Article- of agreement, made this twenty-seventh day of December, in the year one thousand eight hundred and fifty-six, between The Baltimore and Ohio Railroad Company, of the first part, and The Northwestern Virginia Railroad Company, of the second part, witness: That for the purpose of promoting the interest of both companies in the transportation of passengers and freight to and fro between the city of Baltimore and the town of Parkersburg, and for intermediate distances, involving portions of both roads, and avoiding the necessity of changing of cars in any case at the junctions of said roads, to the detriment of their business, and to the inconvenience of persons and injury of property, the said parties of the first part have agreed, and do hereby agree with the said parties of the second part, to work the road of the latter with the rolling stock and machinery, officers and agents, of the said parties of the first part, for the period of five years from the 1st day of January, in the year 1857, keeping the said road and its appurtenances during that time, and delivering them up at the expiration thereof, in as good repair, (necessary wear and tear excepted) as when they undertake the charge of them.

In consideration whereof, the said parties of the second part agree that the said parties of the first part shall collect the entire revenue from all sources of the said road and its appurtenances during the period aforesaid; and that all officers, agents and employés necessary for the maintaining and working said road shall, so soon as the same shall be open for travel to Parkersburg, be appointed and compensated by the said parties of the first part, and until the expiration of the period of five years aforesaid.

64 And it is agreed that the gross revenue aforesaid shall be applied, during the term of five years aforesaid, firstly: to the payment of the interest coupons of the mortgage bonds of the said parties of the second part, as well as the interest coupons of forty-two thousand dollars of certain ten-year bonds issued by the said parties of the second part, as said interest coupons shall become payable; said interest coupons to be cancelled and returned to the said parties of the second part from time to time; secondly: the interest on the amount now or hereafter to become due by the said parties of the second part to the said parties of the first part; thirdly: all taxes and assessments legally imposed on the said parties of the second part during the period of five years aforesaid; and fourthly: such sum, not exceeding five thousand dollars per annum, as may be required to the said parties of the second part for office and other expenses, irrespective of the maintenance and working of the said road.

And it is further agreed that the said parties of the first part shall keep accurate accounts of the gross revenue of the said road, and shall render the same to the said parties of the second part monthly; and that whenever forty per cent. of the said gross revenue for any year after the first shall exceed the amount to be paid by the said parties of the first part, as enumerated in the foregoing paragraph of this agreement, for that year, such excess, to the amount of twenty-five thousand dollars, shall be applied to the said parties of the first part in reduction of the indebtedness to them of the said parties of the second part; and the residue of such excess, if any, for any year after the first, and the whole for the first year, shall be paid over to the said parties of the second part; but no such payment shall exceed six per cent. of the par value of their capital stock, nor shall any such payment be made except for the first year, until twenty-five thousand dollars for each and every year of the five herein mentioned, after the first, that has

65 expired, has been appropriated to the reduction of their debt to the Baltimore and Ohio Railroad Company; and any further residue of such excess, after the payment of the six per cent. aforesaid, shall also go in reduction of the said debt. And it is further agreed that the accounts between the two companies, parties hereto, shall be stated semi-annually, up to the 31st of March and 30th of September.

And it is further agreed that the Baltimore and Ohio Railroad Company, the parties of the first part hereto, shall at once return to the said parties of the second part such amount of the unguaranteed third-mortgage bonds of the latter, now deposited with the said parties of the first part, as will be equal, dollar for dollar, to the amount of bonds or notes of the said parties of the second part, payable one year after the opening of the said road, and which they have issued, or contracted to issue, to their contractors, with the interest accrued and to accrue thereon, the said third-mortgage bonds to be applied at par to the payment of the said bonds or notes so given to contractors. And it is hereby further agreed between the parties hereto, that the Baltimore and Ohio Railroad Company,

the parties of the first part aforesaid, shall purchase from the Northwestern Virginia Railroad Company, the parties of the second part hereto, at the actual cost thereof, on such terms as may suit the said purchasers, the property of the said parties of the second part at Grafton, at the junction of the two roads, including the real estate, buildings and machinery, with the appurtenances other than the line of road proper from the said junction to the Tygart's Valley river, and all the rolling stock, machinery, tools, and other property, provided or intended to be used by the said parties of the second part for working the said road, or keeping the same and its rolling stock and appurtenances in repair. And the said parties of
66 the first part agree to assume and perform the several contract- of the said parties of the second part for the purchase or hire of other rolling stock and its appurtenances intended to be used in working the said road, as though said contracts had been made originally on account of the said parties of the first part.

And the said parties of the first part further agree to advance to the said parties of the second part, from time to time, as required by the latter, such sum or sums of money, or notes of the parties of the first part, as together with the amount to be paid them for the Grafton property and its appurtenances, shall amount to one hundred thousand dollars. And in order to reimburse said advances, the said parties of the second part agree that there shall be paid over to said parties of the first part, the amounts remaining due and unpaid of the stock of the Northwestern Virginia Railroad Company subscribed at Baltimore, Clarksburg and Weston, as the same is collected until such advance is reimbursed.

And it is further agreed that the cost of additions to and improvements upon the works and property of the said parties of the second part, properly chargeable to construction, including the cost of any additional ballasting of the said road, until the same shall be equal to the average of the road of the said parties of the first part, and which additions and improvements shall be deemed necessary by the said parties of the first part to facilitate or increase the business of the said road, and shall be made by the said parties of the first part, shall be added to the indebtedness of the parties of the second part aforesaid, and shall be paid as is herein provided.

And the said parties of the second part hereby agree to endeavor to obtain from the General Assembly of Virginia, the passage of an act authorizing the consolidation of the two companies, parties hereto, on terms satisfactory to the parties of the first part,
67 under the name of the Baltimore and Ohio Railroad Company. And it is agreed that if any such act is passed at any time during the period of five years aforesaid, or of any farther and similar period under an agreement like to the present, and is accepted by general meetings of the stockholders of the two companies, which shall be called for the purpose within two months after the passage of such act, then this agreement, or any renewal thereof, is to be determined; and the said Baltimore and Ohio Railroad Company hereby agree, in that event, to become responsible for all the then existing debts of the said parties of the second part, con-

tracted in the construction and completion of their road, or growing out of their now existing contracts, responsibilities and engagements, and they shall thenceforth be the owners of all the works, property and other assets of the said parties of the second part; and the said parties of the first part agree, in that event, to issue, when demanded, certificates of ownership of the stock of the said Baltimore and Ohio Railroad Company, in exchange for the stock certificates of the said parties of the second part, at the rate of one share of the former, of the par value of $100, for two shares of latter, of the par value of $50 each.

And it is further agreed, that should the consolidation above referred to not take place during the period of five years hereinbefore provided for, then an agreement similar to the present shall be made for another and like period, at the option of the said parties of the first part, on the same terms and conditions; but should there be no such further agreement entered into, or at the expiration of any such further agreement, no part of the debt incurred, or to be incurred, of the parties of the second part aforesaid to the said parties of the first part, shall be payable, except as above provided, until the expiration of six months after the agreement between the said companies for working the said road is finally deter-
68 mined; and on such determination, whenever it shall take place, the said parties of the first part shall reconvey to the said parties of the second part the Grafton property on repayment of costs, including the cost of the improvements which may be made thereon by the said parties of the first part, without interest. And the parties hereto hereby mutually bind themselves to the performance of the several acts to be respectively done or performed by them according to the tenor of this agreement.

In testimony whereof the said companies have severally caused these presents to be signed by their presidents and sealed with their seals, on the day and year first above written.

(Signed) THOS. SWANN,
President N. W. Va. R. R. Co.
CHAUNCY BROOKS,
President B. & O. R. R. Co.

I hereby certify that the foregoing, from pages 1 to 7, inclusive, is a true copy from the records of the Baltimore and Ohio Railroad Company.

May 1st, 1871.

W. P. WATTS,
Clerk B. & O. R. R. Co.

No. 111. *Affidavit.*

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

Be it remembered that on this first day of May, A. D. 1871, before me, the subscriber, a justice of the peace of the said State in and for the city aforesaid, personally appeared William P. Watts,

clerk of the Baltimore and Ohio Railroad Company, and made oath on the Holy Evangely of Almighty God that the annexed instrument of writing is a correct copy from the records of said company.

Sworn before—

WM. BONE, *J. P.*

69 And at another day, to wit, at a circuit court continued and held for Wood county, at the court-house thereof, on the 8th day of September, 1870:

This day came the parties, by counsel, and the complainant replies generally to the answer of the defendant The Baltimore and Ohio Railroad Co. filed on yesterday.

And at another day, to wit, at a circuit court continued and held for Wood county, at the court-house thereof, on the 12th day of May, 1871:

On motion of the complainant and with leave of the court this cause is remanded to rules, with leave to amend his bill and make new parties by paying all cost.

And at another day, to wit, at rules held in the clerk's office on the first Monday in June, 1871, came the plaintiff, by his attorney, and filed his amended bill, and also filed his affidavit as to the non-residence — defendants; which said amended bill has heretofore been copied, and which affidavit is in the words and figures following, to wit:

Affidavit.

WOOD COUNTY CIRCUIT COURT,
CLERK'S OFFICE, *5th June*, 1871.

WM. H. MATTINGLY, Complainant,
vs.
THE NORTHWESTERN VIRGINIA RAILROAD CO. and Others, Defendants. } In Ch'y.

This day J. M. Jackson personally appeared before the subscriber, clerk of the circuit court of Wood county, and made oath that the defendants The Mayor and City Council of Baltimore are non-residents of the State of West Virginia.

J. M. JACKSON.

Subscribed and sworn before me the day and year above mentioned.

L. P. NEAL, *Cl'k.*

70 *Order of Publication Awarded at Same Rules.*

And at another day, to wit, at rules held in the clerk's office of said circuit court on the first Monday in August, 1871, the order of publication heretofore awarded was filed; which said order of publication is in the words and figures following, to wit:

Order of Publication.

STATE OF WEST VIRGINIA, *To wit:*

At rules held in the clerk's office of the circuit court of Wood county on the first Monday in June, 1871:

WILLIAM H. MATTINGLY, Compl't,
vs.
THE NORTHWESTERN VIRGINIA RAILROAD CO. and Others, Defendant-. } In Ch'y.

The object of this suit is to obtain a decree against the defendants for the amount of plaintiff's claims set out in the bill, and to subject the property, rights, and credits of the N. W. Va. R. R. Company in the hands of its codefendants or either of them to the payment of same; and it appearing by affidavit filed that the defendants The Mayor and City Council of Baltimore are not residents of the State, on motion of the complainant, by counsel, it is ordered that said absent defendants appear here within one month after the first publication of this order and do what is necessary to protect their interest in this suit, and that a copy of this order be published and posted according to law.

A copy.

Teste: LAW P. NEAL, *Clerk.*

I, Wm. P. Cooper, do hereby certify that I am editor of the Parkersburg Gazette, a public newspaper published in the city of Parkersburg, Wood county, West Virginia; and I further certify that I published in said newspaper the annexed order of publica-
71 tion in the case of Wm. H. Mattingly *vs.* N. W. Va. R. R. Co. for four consecutive weeks, commencing with the number issued on the 8th day of June, 1871.

Given under my hand this 7th day of July, 1871.

W. P. COOPER.

Advertising fee, $7.50, paid by W. H. Mattingly.

This — W. P. Cooper appeared before me, Law P. Neal, clerk of the circuit — of Wood county, and made oath that he posted the annexed order of publication at the front door of the court-house of Wood county on the first day it was issued.

Given under my hand this 7th day of July, 1871.

LAW P. NEAL, *Clk.*

And the defendants being summoned and failing to appear, a decree *nisi* was entered against them.

And at another day, to wit, at rules held in office of said circuit court on the last Monday in August, 1871, the defendants still failing to appear, the bill was taken for confessed and cause set for hearing.

And at another day, to wit, at a circuit court continued and held for Wood county, at the court-house thereof, on the 11th day of October, 1878:

The judge of this court being so situated as to render it improper, in his judgment, for him to decide this cause, by agreement of counsel it is ordered that this cause be removed to the circuit court of Ohio county, to be docketed and further proceeded in in that court, and that the clerk of this court is hereby required to transmit to the clerk of the circuit court of said Ohio county the original papers and a copy of all orders made in this cause in this court, together with a taxation of the costs *of* in this court.

72 And at another day, to wit, at a circuit court continued and held for Wood county, at the court-house thereof, on the 23rd day of January, 1879:

By consent and agreement of parties, by their counsel, the order made in this cause on the 11th day of October, 1878, removing it to the circuit court of Ohio county for further proceedings to be had therein, is set aside, and it is ordered that this cause be, and the same is, docketed in this court for further proceedings to be had therein.

J. B. JACKSON,
Att'y for Pl'ff.
JNO. A. HUTCHINSON,
Att'y for D'f't.

And now, at this day, to wit, at a circuit court continued and held for Wood county, at the court-house thereof, on the 23rd day of January, 1879:

This day the said defendant, The Baltimore and Ohio Railroad Company, by its attorney, presented its petition praying the removal of the said cause into the circuit court of the United States for the district of West Virginia, under the Revised Statutes of the United States, and tendered a bond in the penalty of $250.00, with conditions prescribed by the act of Congress, with good and sufficient security, as required by said statute; and the court being of opinion that the said bond and surety are sufficient and the affidavit filed being according to the requirements of the statute, it is ordered that all further proceedings in this cause be stayed, and this court will proceed no further in the cause.

"Petition."

In the Circuit Court of Wood County, State of West Virginia.

WILLIAM H. MATTINGLY
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY and Others. } In Chancery.

To the hon. the judge of the circuit court of Wood county:

Your petitioner, The Baltimore and Ohio Railroad Com-
73 pany, a corporation created and existing under and by vir-

tue of the laws of the State of Maryland, respectfully shows that it is one of the defendants and the principal one in the foregoing suit, and that the same was commenced in the year 186– by said plaintiff in the said court; that your petitioner was at the time of bringing the said suit and still is such corporation and as such a citizen of the said State of Maryland and a resident thereof.

Your petitioner further shows that there is and was at the time said suit was brought a controversy therein between your petitioner and the said plaintiff, William H. Mattingly, who is a citizen of the State of West Virginia and resident thereof; that said suit was brought by the said Mattingly for the purpose of recovering a claim against the Northwestern Virginia Railroad Company, which was sold out and purchased as stated in the answer in said cause of your petitioner, and that the matter in dispute in said cause exceeds the sum of $500, inclusive of costs; that said suit has not been tried, but is pending in said State court, and your petitioner desires to remove the same into the circuit court of the United States for the district of West Virginia, in pursuance of the act of Congress in that behalf provided.

Your petitioner further says that he has filed the affidavit required by the statute in such cases and offers herewith his bond, executed by Jno A. Hutchinson, of Parkersburg, as surety, in the penal sum of two hundred and fifty dollars, conditioned as by said act of Congress required.

Your petitioner therefore prays that the said bond may be accepted as good and sufficient according to the said act of Congress, and that the said suit may be removed into the next circuit court of the United States in and for the said district of West Virginia pursuant to the aforesaid act of Congress in such case made and provided, and that no further proceedings may be had therein in this court.

74 And your petitioner will ever pray, &c.

JNO. A. HUTCHINSON,
Attorney for the B. & O. R. R. Co.

In the Circuit Court of Wood County, State of West Virginia.

WILLIAM H. MATTINGLY, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD Co. and Others, Defendants. } Affidavit.

STATE OF WEST VIRGINIA, *County of Wood*, } ss:

I, John A. Hutchinson, being duly sworn, do say that I am one of the attorneys in the above-entitled cause for the said The Baltimore and Ohio Railroad Co.; that I have reason to believe and do believe that from prejudice and local influence — will not be able to obtain justice in said State court.

Subscribed by the said Jno. A. Hutchinson in my presence and

by him sworn to before me, at Parkersburg, this 23rd day of July, A. D. 1879.

O. M. CLEMENS,
Clerk Circuit Court of Wood Co.

"*Bond.*"

Know all men by these presents that we, The Baltimore and Ohio R. R. Co., as principal, and Jno. A. Hutchinson, of Parkersburg, as surety, are hereby held and firmly bound unto Wm. H. Mattingly in the penal sum of two hundred and fifty dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of this obligation is such that if the said Baltimore & Ohio Railroad Company shall enter and file, or cause to be entered and filed, in the next circuit court of the United States in and for the district of West Va., on the first day of its session, copies of all process, pleadings, depositions, testimony, and other pro-
75 ceedings in a certain suit or action now pending in the circuit court of the county of Wood and State of W. Va., in which Wm. H. Mattingly is plaintiff and The Baltimore & Ohio R. R. Co. and others are defendant-, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation to be void; otherwise of force.

Dated July 23rd, A. D. 1879.

THE BALTIMORE & O. R. R. CO., [SEAL.]
By JNO. A. HUTCHINSON.
JNO. A. HUTCHINSON. [SEAL.]

DEPOSITIONS.

"*Notice.*"

In the Circuit Court of Wood County, State of West Virginia.

WILLIAM H. MATTINGLY, Pl'ff,
vs.
NORTHWESTERN VIRGINIA R. R. Co., PARKERSBURG BRANCH R. R. Co., BALTIMORE & OHIO R. R. Co., D'f'ts.

To Capt. William H. Mattingly:

Take notice that the depositions of Burton Despard and others will be taken at the office of Despard & Goff, on Despard street, in the town of Clarksburg, in the county of Harrison and State of West Virginia, on the 2nd day of May, 1871, between the hours of 9 a. m. and 4 p. m., to be read in evidence on the hearing of the above cause in behalf of the said defendants.

If from any cause the taking of the same shall not be commenced

or, being commenced, shall not be completed on that day, the taking of the same will be adjourned from time to time until they are completed.

Yours, &c.,

BALTIMORE & OHIO RAILROAD CO.,
By G. H. LEE, *Solicitor.*

76 *"Return."*

Executed April 27th, 1871, by delivering a true copy of the within to a white person above the age of 16 years, his wife, a member of W. H. Mattingly's family, at his usual place of abode, and explaining purport of same, said W. H. Mattingly not being found at his usual place of abode in Wood Co.

J. H. SPENCER, *D. S.*,
For W. J. HILL, *S. W. C.*

Deposition.

In the Circuit Court of Wood County, West Virginia.

WILLIAM H. MATTINGLY, Pl'ff,
vs.
NORTHWESTERN VIRGINIA R. R. CO., PARKERSBURG BRANCH R. R. CO., BALTIMORE & OHIO R. R. CO., Def'ts.

Pursuant to the annexed notice, I, Virginius P. Chapin, a notary public in and for the county of Harrison, in the State of West Virginia, proceeded on the day and between the hours and at the place mentioned in the annexed notice to take the following depositions, to be read in evidence on the hearing of the above cause on behalf of the said defendants.

Present: The plaintiff in person and the defendants by counsel.

BURTON DESPARD, a witness of lawful age, called on behalf of the defendants, after being duly sworn, deposeth and saith:

Question by defendants' counsel. What is your name, age, place of residence, and occupation?

Answer. My name is Burton Despard. I am fifty four or five years of age. I reside in Clarksburg, Harrison county, West Virginia, and a lawyer by profession.

77 Question by same. Where did you reside in the year 1865 and how were you then engaged?

Answer. I resided at the same place and engaged in the practice of law, running coal mines, and farming.

Question by same. Who was the counsel or agent of the Baltimore & Ohio Railroad Company, the Northwestern Virginia Railroad Company, and the mayor and council of the city of Baltimore in reference to the sale made in 1865, by the last-named party, of the property and franchise of the Northwestern Virginia Railroad

Company, and under whose superintendence and direction was said sale made?

Answer. I was the counsel for the Northwestern Virginia Railroad Company at that time and of the Baltimore & Ohio Railroad Company. I was never counsel for the city of Baltimore. I acted for both of said railroad companies as agent when specially requested. In the sale above referred to, if my recollection is correct, and I do not think I am mistaken, I acted in the sale of said property (meaning the Northwestern Virginia Railroad Company and its franchises) as the agent for the city of Baltimore and also for the Baltimore and Ohio Railroad Company, as well, as I then understood, for the Northwestern Virginia Railroad Company. The said sale was made under my superintendence, I employing an auctioneer to cry the sale. I was present from the beginning to the end of the sale.

Question by same. Please state the time, place, and circumstances of said sale, particularly whether the same was advertised by notice of the time and place thereof; how such notice was published and for what time previous to the sale, and whether the sale was made at the time and place specified in the notice or a different time?

Answer. The said sale was advertised at that time in what was then called the "National Telegraph," a newspaper published
78 in the town of Clarksburg; also in the "Ritchie County Press," published in Ritchie county, West Virginia; in the "Parkersburg Gazette," published at Parkersburg, in Wood county, West Va.; in the "Baltimore American," published in the city of Baltimore. I have an impression that it was also published in some newspaper printed in the city of Wheeling, but I am not confident of this, not having access to my report as to my acts and doings in reference to said sale, addressed to the then mayor, *or* as well as I recollect, of the city of Baltimore. The time of the publication was sent to me at Clarksburg in newspaper form before said sale. I am satisfied from my recollection of it that the said publication was made over thirty days. Said sale was made on the day and at the place indicated in the said notice or advertisement. I also saw on some part of the front door of the court-house of Wood county a copy of said notice there posted on the day before said sale. The said sale was made on the fifteenth day of February, 1865, to the best of my recollection, and in front of the court-house, and nearly in front of the door of the court-house of Wood county, in the city of Parkersburg, at public auction, to the highest bidder, I employing an auctioneer to cry the sale.

Question by same (No. 5). State whether said sale was made against the will and without the consent of the Northwestern Virginia Railroad Company or with the consent and concurrence of that company.

Answer. I know nothing personally as to what ordinances or resolutions the Northwestern Virginia Railroad Company adopted in reference to the subject referred to, except from information derived from Peter G. Van Winkle, Esq., who was then acting as president of the company, which information I derived from per-

sonal interviews with him and, if my recollection is right, by letter or letters. The information derived, as last mentioned, was that the said sale was made with the concurrence of said Company.

79 Question by same (No. 6). Who was the purchaser at said sale and for what sum?

Answer. The Baltimore and Ohio Railroad Company was the purchaser and, to the best of my recollection, for the sum of thirty-two thousand dollars.

Question by same (No. 7). What was the relation as creditor and debtor, at the time of the said sale, between the Baltimore and Ohio Railroad Company and the Northwestern Virginia Railroad Company? In other words, was either of those companies indebted to the other; and, if yea, which?

Answer. My understanding was, and I have no doubt of the fact, that the Northwestern Virginia Railroad Company was largely indebted to the Baltimore and Ohio Railroad Company.

Question by same (No. 8). State the amount of the indebtedness of the Northwestern Virginia Railroad Company to the Baltimore and Ohio Railroad Company at the time of said sale, in round numbers, as nearly as you can.

Answer. Personally I do not know, but from the reports of both companies it was several million dollars, but I cannot state the amount, not having those reports before me. The reports will show what I regarded the indebtedness at the time of the sale. Whether they are correct or not, of course I do not know.

Question by same (No. 9). What was the financial condition of the Northwestern Virginia Railroad Company? Was it solvent or insolvent?

Answer. From the best information I could obtain prior to said sale, I being a creditor of said company, I regarded the said Northwestern Virginia Railroad Company as insolvent.

Question by same (No. 10). Were the tunnels on the Northwestern Virginia Railroad Company arched with stone before said sale?

80 Answer. The whole of the said tunnels were not. I cannot recollect any that was, but I am under the impression that on what is called the Clarksburg tunnel there was some work done with stone and brick. I may be mistaken, but this is according to my recollection.

Question by same (No. 11). Are they now so arched; and, if so, since what time has it been done and by whom?

Answer. I have never personally examined those tunnels; neither am I competent to say whether they are so arched or not, not being a scientific engineer competent to examine them, but from casual observation I presume they are arched. Most of the said work has been done since the said sale, and by the Baltimore and Ohio Railroad Company, if not all of it.

Question by same (No. 12). State, if you know, in round numbers the probable cost of the arching of those tunnels.

Answer. I have no information on the subject except from the reports of the company and am not competent to judge.

Question by same (No. 13). Has the road formerly known as the Northwestern Virginia railroad been connected with any railroad across the Ohio river; if yea, with what road and how connected?

Answer. I understand from the officers of the Baltimore and Ohio Railroad Company, as well as from the officers of the Cincinnati and Marietta Railroad Company, that the road that was formerly the Northwestern Virginia railroad is connected with the bridge across the Ohio river at Parkersburg with the Marietta and Cincinnati railroad. There is no doubt about that connection.

Question by same (No. 14). By whom was the railroad bridge across the Ohio constructed and the probable cost in round
81 numbers?

Answer. My understanding is that it was constructed by the Baltimore & Ohio Railroad Company. At what cost I personally do not know, though I have seen the reports of both companies, but I have not these reports with me. The bridge is a very expensive one, but from want of knowledge on such subject I feel myself incompetent to judge of its cost.

Question by same (No. 15). Look at the printed pamphlet now shown you, entitled "Northwestern Virginia Railroad, agreement of capitalization," and marked "A," and say whether the same was the pamphlet issued by the companies therein referred to and for the purposes therein expressed.

Answer. The pamphlet referred to in the last question, marked "A," which I now countermark "B. Despard" on the first printed page, is the same pamphlet issued by the said companies, with the exception that attached thereto was a memorandum for the stockholders and creditors of the Northwestern Virginia Railroad Company to sign. Several copies of said pamphlet were furnished me by P. G. Van Winkle, then acting as president of the Northwestern Virginia Railroad Company.

Question by same (No. 16). State whether the Northwestern Virginia Railroad Company was reorganized in conformity to the provisions of the agreement between that company and the Baltimore and Ohio Railroad Company; and, if yea, by what name.

Answer. The said company was reorganized according to the agreement mentioned in said pamphlet. I cannot say what the name was with any degree of certainty. I received my certificates of stock for the indebtedness of the Northwestern Virginia Railroad Company to me in the city of Baltimore, where I immediately deposited them for safe-keeping. I have not got them here for reference and do not recollect the name. My impression is that it was called the Northwestern branch, but I cannot say.

82 Cross-examination:

Question by plaintiff. What was the original cost of the Northwestern Virginia railroad?

Answer. I do not know, except from the reports of both com-

panies. Personally I know very little about it. My only information is from the reports of the companies. The pamphlet marked "A" I regarded at the time it was issued as being an honest exhibition of the condition of the company. I acted on it as one of the creditors of the company.

Question by same. Is the Northwestern Virginia Railroad Company of much importance and value to the Baltimore and Ohio Railroad Company?

Answer. I regard all lateral branches of the Baltimore and Ohio Railroad Company as very important, more especially with the competition that said company has by rival routes and enterprises. My opinion is that if the legislature of Virginia had granted them a proper charter in or near the present location of the Northwestern Virginia railroad that this would have been the main line to the West instead of by Wheeling. In addition to this, I think by proper enterprise on the part of the Baltimore and Ohio Railroad Company they will yet make it so, and therefore I think it is a very valuable improvement to the Baltimore and Ohio Railroad Company.

Question by same. Is it not now and has it not always been understood that this branch was intended by the Baltimore and Ohio Railroad Company to be made the main and short line between the East and West?

Answer. My own opinion was, and I so urged the Baltimore & Ohio Railroad Company to make this line the short line. They were opposed to it, but from rivalry of other roads they have recently been induced to patronize this route. How long they may patronize the same I think it a matter of doubt. I think
83 the Baltimore and Ohio Railroad Company contemplates other connections with the West which will impair the value of the present route by way of Parkersburg. I think the route by way of Parkersburg is valuable to the Baltimore & Ohio Railroad Company, to the commercial interests of the city of Baltimore, and to the citizens along the line of the Northwestern Virginia railroad.

And further this deponent saith not.

B. DESPARD.

I, Virginius P. Chapin, a notary public in and for the county of Harrison, in the State of West Virginia, do certify that on the day and between the hours and at the place mentioned in the annexed notice and the caption hereto I proceeded to take the foregoing depositions; that the said deponent was duly sworn by me previous to taking said deposition, and that after the same was completed the deposition was read by me to the deponent, who thereupon subscribed his name thereto in my presence.

Given under my hand this 2nd day of May, 1871.

V. P. CHAPIN,
Notary Public.

I was engaged in taking the foregoing deposition five hours, at 75 cts. per hour, $3.75.

V. P. CHAPIN, *N. P.*

The plaintiff excepts to so much of the within deposition as purports to give the opinions of the witness, and also all the said testimony as gives the declaration of third parties.

May 3rd, 1871.

W. H. MATTINGLY,
By JACKSON & SMALL, *Att'ys.*

84 *"Notice to Take Depositions."*

In the Circuit Court of Wood County, State of West Virginia.

WILLIAM H. MATTINGLY, Pl'ff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

To William H. Mattingly:

Take notice that the deposition of Peter G. Van Winkle will be taken at the office of W. W. Van Winkle, on Julian street, in the city of Parkersburg, on the third day of December, 1870, between the hours of 9 a. m. and 5 p. m., to be read in evidence on the hearing of the above cause in behalf of the said defendants. If from any cause the taking of the same shall not be completed on that day the taking of the same will be adjourned from time to time until they are completed.

Yours, &c.,

BALTIMORE & OHIO RAILROAD CO.,
By COUNSEL.

"Return."

STATE OF WEST VIRGINIA, }
County of Wood, } *ss:*

This day personally came before me, the undersigned authority, J. W. Moss and, being duly sworn, says that he served a copy of the within notice on William H. Mattingly, in Parkersburg, on the first day of December, 1870, about 5 o'clock p. m.

J. W. MOSS.

Subscribed and sworn to before me this 2nd day of December, 1870.

DAVE D. JOHNSON,
Notary Public within and for said County.

Deposition.

In the Circuit Court of Wood County, State of West Virginia.

WILLIAM H. MATTINGLY
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY *et al.*

85 Deposition of Peter G. Van Winkle, taken before me, Dave D. Johnson, a notary public within and for the county of Wood, in the State of West Virginia, at the office of W. W. Van Winkle, on Julian street, in the city of Parkersburg, in the county of Wood and State of West Virginia, on the third day of December, 1870, between the hours of 9 a. m. and 5 p. m., to be read in evidence on the hearing of the above cause in behalf of The Baltimore & Ohio Railroad and others, defendants.

Present: W. W. Van Winkle, as attorney for defendants.
Present: J. M. Jackson, attorney for W. H. Mattingly.

PETER G. VAN WINKLE, of lawful age, being first duly sworn according to law, deposes and says:

Question 1. What is your name, your age, your place of residence, and your occupation or pursuit?

Answer. My name is P. G. Van Winkle; my age is sixty-two (62). I reside in Parkersburg, W. Va. I am in no business whatever at present.

Question 2. Were you at any time president of the Northwestern Virginia railroad? If so, state what time you were such president.

Answer. I was president of the Northwestern Virginia railroad from February, 1857, until the dissolution of the company.

Question 3. Who was the president of said railroad company in 1865, when the franchise and property of the same was sold under the lien given to the mayor and city council of Baltimore?

Answer. I was.

Question. 4. State the circumstances that led to said sale, and especially whether the same was made against the will or without the consent of the Northwestern Virginia Railroad Company.

86 Answer. The city of Baltimore held a deed of trust on the works and property of the company for a million and a half dollars ($1,500,000) and the company failed to pay the interest in July, 1857, and also in January, 1860, and subsequently. It never paid any interest after July, 1859. By this failure to pay the interest, as I have stated, the deed of trust was forfeited and the sale was directed under the trust by the city of Baltimore or its assignees. The sale was made with the full knowledge of the Northwestern Virginia Railroad Company and without opposition on its part. On the contrary, they were able to make an arrangement with the city of Baltimore by which the city relinquished some seven hundred thousand dollars ($700,000) of its claim, all of which

is set out in the articles of reorganization executed by the city of Baltimore and the Baltimore and Ohio Railroad Company.

Question 5. State as nearly as you can remember the amount of the indebtedness of the Northwestern Virginia Railroad Company to the said city of Baltimore for coupons paid on its guaranteed bonds or otherwise at the time of said sale; give a general idea of the indebtedness without detail.

Answer. The city had paid the six months' interest on the bonds it had guaranteed, due July 1st, 1857, amounting to forty-five thousand dollars ($45,000.) They had advanced the company between November 19th, 1859, and April 17th, 1862, upwards of one hundred and fifteen thousand ($115,000) for arching the tunnels on the road of the company, on which they had received no interest. They also paid the interest on the bonds they guaranteed on and after January, 1860, up to the time of the sale, at the rate of ninety thousand dollars ($90,000) per annum, and by the said articles of reorganization they agreed to pay the bonds they had guaranteed and all the outstanding coupons. These items amounted together to upwards of nineteen hundred thousand dollars ($1,900,000.00), including the guaranteed bonds.

87

And further deponent saith not.

P. G. VAN WINKLE.

STATE OF WEST VIRGINIA, }
Wood County. }

I, Dave D. Johnson, a notary public within and for the county aforesaid, do hereby certify that the foregoing deposition of P. G. Van Winkle was duly sworn to and acknowledged before me; that it was duly taken, in pursuance of the notice hereto annexed, at the office of W. W. Van Winkle, on Julian street, in the city of Parkersburg, in said county of Wood, on the 3rd day of December, 1870, between the hours mentioned in said notice, for the purpose in said notice mentioned, and that the parties were present by their attorneys, as noted in the caption hereof.

Given under my hand this 3rd day of December, 1870.

DAVE D. JOHNSON,
Notary Public.

Notary Fee.

2 hours	$1 50
	25
Taxing costs	30
	$2 05

Paid by defendant.

Teste: DAVE D. JOHNSON,
Notary Public.

Agreement Between the Baltimore and Ohio and the Northwestern Virginia Railroad Companies.

OFFICE N. W. VA. RAILROAD CO.,
PARKERSBURG, *April 16th*, 1862.

At a meeting of the president and directors of this com-
88 pany, duly held on the 12th inst., a communication from John W. Garrett, Esq., president of the Baltimore and Ohio Railroad Company, a true copy whereof is hereto annexed, was submitted and read; whereupon it was unanimously—

"Resolved, That the communication from John W. Garrett, Esq., president of the Baltimore and Ohio Railroad Company, bearing date on the ninth day of January last and submitted to the board at this meeting, be entered in full upon the minutes, and that this board, for and on behalf of the Northwestern Virginia Railroad Company, do hereby assent and agree to the terms and conditions therein expressed, and do further agree that the said communication and this assent and agreement shall constitute and be deemed and taken to be a sufficient and mutually binding contract between the two companies."

(Signed) P. G. VAN WINKLE, *President.*

Copy.

BALTIMORE, *January 9th*, 1862.

William McKim, Esq., chairman.

DEAR SIR: In accordance with the verbal understanding between us heretofore upon the principal points, I have now to say that the agreement which existed with the Northwestern Virginia Railroad Company having expired on the 31st ulto., and there having been no intention on the part of this company, as you were notified, to renew the same, the following memorandum is submitted as explanatory of the terms on which this company are willing to work the Northwestern Virginia railroad from and after the 1st inst. until the 1st January, 1863, and until the expiration of three months from the date at which either party may give to the other notice in writing that the agreement to this effect must -erminate:

89 1. The absolute control of the working, repair, and collection of the revenue of the Northwestern Virginia railroad to be in the hands of the Baltimore and Ohio Co., without the interference in any manner of the former company.

2. The agents and employés required in carrying out this agreement to be appointed by the Baltimore and Ohio Co. alone, with such compensation as said company may deem judicious.

3. The gross revenue to be applied as received and as may become necessary to the payment of an annual salary of five hundred dollars to the president of the Northwestern Virginia Railroad Company from the 1st instant, which shall be in full of all expenses and other charges on his part; to the payment of the interest on $11,500 of the bonds of said company, which were given for the

purchase-money of certain property on the banks of the Kanawha in the town of Parkersburg, bought from J. J. Jackson and others, including the interest thereon due on the 1st July last; to the payment of the taxes properly assessed by the town of Parkersburg on certain property therein, including arrears up to this time, and to the expenses of working, maintenance, and for the use of machinery and collecting the revenue of the said Northwestern Virginia railroad, as well as any other expenditures incurred in carrying out this agreement.

4th. It is understood that the said Baltimore and Ohio Railroad Co. shall render to the said Northwestern Virginia Railroad Company a full statement of accounts of the dates of 1st July and 1st January during the continuance of this agreement, at which periods respectively settlements shall take place, which shall be the basis of further transactions; and

5th. Whereas it has been a question how far the said Northwestern Virginia Railroad Company, its property and appurtenances, in whole or in part, are liable to taxation by the State of Virginia, which question is understood to have arisen with regard to other corporations of said State supposed to be similarly situated and to be now pending in the courts of Virginia, it is agreed that should the decision of the highest appealed court settle the question of liability and the property or effects of the said company be subject to seizure by the said State for the said taxes during the existence of this agreement, then the Baltimore and Ohio Railroad Co. will pay the said taxes in addition to the items aforesaid.

90

6th. It is understood, however, that in the event of the working of the said Northwestern Virginia Railroad Company being interfered with by military operations of any sort or civil war the Baltimore and Ohio Railroad Company shall be under no obligations to work the said road during the continuance of such interruptions, nor shall it be under any obligations to repair the same; neither shall the Baltimore and Ohio Railroad Company be obliged to work the said road should the mayor and city council of Baltimore withhold their appropriation for the tunnels on the said Northwestern Virginia railroad under existing ordinances. Should the foregoing terms meet the views of the Northwestern Virginia Railroad Company a resolution of the directors to that effect will, with this letter, constitute a sufficient contract between the two companies.

I am, &c., &c., &c.,

(Signed) JNO. W. GARRETT, *Pres't.*

I hereby certify that the above is a true copy of the agreement between the Baltimore and Ohio Railroad and the Northwestern Virginia Railroad Companies on file among the records of the Baltimore and Ohio Railroad Company.

May 1st, 1871.

W. P. WATTS,
Clerk B. & O. R. R. Co.

Affidavit.

No. 111.

STATE OF MARYLAND, *Baltimore City,* } *To wit:*

91 Be it remembered that on this first day of May, A. D. 1871, before me, the subscriber, a justice of the peace of the said State in and for the city aforesaid, personally appeared Wm. P. Watts, clerk of the Baltimore and Ohio Railroad Company, and made oath on the Holy Evangely of Almighty God, that the annexed instrument of writing is a correct copy of agreement between the Baltimore & Ohio Railroad Company and the Northwestern Virginia Railroad Company, as appears on the records of the Baltimore and Ohio R. R. Company's books.

Sworn before—

WM. BONE, *J. P.*

WOOD COUNTY CIRCUIT —, CLERK'S OFFICE, *Feb'y 7th*, 1879.

I, O. M. Clemens, clerk of the circuit court of Wood county, hereby certify that the foregoing is a true transcript of the record and proceedings in a certain suit in chancery lately depending in the said circuit court, on the chancery side thereof, between William H. Mattingly, complainant, and The Northwestern Virginia Railroad Company and others, defendants, with all things touching the same, as fully and wholly as they now exist among the records of my office.

In testimony whereof I have hereto subscribed my name and affixed the seal of said court the day and year first above written.

[SEAL.] O. M. CLEMENS, *Clerk.*

Fee for this record, $35.80.

92 And on another day, to wit, on the 28th day of January, 1882, the following order was made and entered of record, to wit:

WILLIAM H. MATTINGLY
vs.
THE NORTHWESTERN VIRGINIA RAILROAD COMPANY and Others. } In Equity.

This day came the parties, by their counsel, and thereupon the defendant The Baltimore & Ohio Railroad Company, by its counsel, filed its demurrer to the bill in this cause, which was set down for argument, and, being argued and inspected by the court, the said demurrer was overruled, and thereupon the Baltimore & Ohio Railroad Company filed its answer to the said bill, and the plaintiff takes time to except or reply to the said answer.

And on another day, to wit, on the 15th day of February, 1884, the following order was made and entered of record, to wit:

WILLIAM H. MATTINGLY
vs.
THE NORTHWESTERN VIRGINIA RAILROAD COMPANY and Others. } In Chancery.

The complainant having departed this life and Thomas C. Mattingly having qualified as administrator with the will annexed of the estate of said complainant, the said Thomas C. Mattingly, administrator as aforesaid, this day appeared, by W. L. Cole, his attorney, and suggested the death of said complainant, and on motion of the said Thomas C. Mattingly, administrator as aforesaid, it is ordered that this cause be revived and proceeded in *in* his name, and this cause is continued until the next term.

93 And on another day, to wit, on the 16th day of February, 1885, the following order was made and entered of record, to wit:

WILLIAM H. MATTINGLY
vs.
THE NORTHWESTERN VIRGINIA RAILROAD COMPANY and Others. } In Equity.

This day came the parties, by their attorneys, and thereupon, upon motion of the complainant, this cause is submitted upon the bill, answer, and proofs therein.

And on another day, to wit, on the 28th day of June, 1886, the following order was made and entered of record, to wit:

THOMAS C. MATTINGLY, Administrator of William H. Mattingly, Deceased,
vs.
NORTHWESTERN VIRGINIA RAILROAD COMPANY. } In Equity.

On motion of the defendants and for reasons appearing to the court, it is ordered that the order made in this cause on the 16th day of February, 1885, be, and the same is, set aside, and leave is given the said defendants to take any depositions they may be advised within three months from and after the 15th day of July, 1886.

And on another day, to wit, on the 5th day of January, 1887, the following depositions were filed in the clerk's office of said court:

Notice.

In the Circuit Court of the United States for the District of West Virginia. In Equity.

THOS. C. MATTINGLY, Adm'r of Estate of W. H. Mattingly, Dec'd, Plaintiff,
vs.
NORTHWESTERN VA. R. R. Co. and Others, Def'ts.

To the above-named plaintiff or his counsel:

Take notice that the deposition of W. W. Van Winkle and others will be taken at the office of Van Winkle & Ambler, in the city of Parkersburg, in the county of Wood and State of West Va., on the 27th day of December, 1886, between the hours of 9 a. m. and 5 p. m., to be read in evidence on the hearing of the above cause in the behalf of the said defendants.

94

If from any cause the taking of the same shall not be commenced, or, being commenced, shall not be completed on that day, the taking of the same will be adjourned from time to time until they are completed.

Yours, &c.,

NORTHWESTERN VA. R. R. CO., &c.,
By COUNSEL.

JNO. A. HUTCHINSON,
For Defendants.

Return.

STATE OF WEST VIRGINIA, *Wood County,* } *ss:*

This day personally appeared before me, J. W. Vandervort, a notary public in and for said county, John Hogan, Jr., who made oath and says that he served the within notice on the within-named plaintiff by delivery a copy thereof to W. N. Miller, his attorney, on the 11th day of December, 1886, said plaintiff being a non-resident of West Va.

J. HOGAN, JR.

Taken, sworn to, and subscribed before me this 13th day of December, 1886.

LEVIN SMITH,
Notary Public.

The depositions of W. W. Van Winkle and others, taken before me, Levin Smith, a notary public in and for the county of Wood, State of West Virginia, on the 27th day of December, 1886, between the hours of 9 a. m. and 5 p. m., at the office of Van Winkle & Ambler, pursuant to the notice hereto annexed, to be read in behalf of Northwestern Va. R. R. Co. in a certain suit in
95 equity now pending in the circuit court of the United States for the district of West Virginia between Thos. Mattingly, adm'r of estate of W. H. Mattingly, plaintiff, and Northwestern Va. R. R. Co., defendant.

On motion of the defendant, by counsel, the taking of these depositions is continued until the 29th day of December, 1886, at the same time and place.

LEVIN SMITH,
Notary Public.

DECEMBER 29, 1886.

Met in pursuance to adjournment.

Present: Jno. A. Hutchinson, counsel for defendant, and W. N. Miller, counsel for plaintiff.

W. W. VAN WINKLE, a witness of lawful age, being by me first duly sworn, deposeth and saith:

1st Q. State what official relation you occupy towards the Parkersburg Branch R. R. Co., lately known as the Northwestern Virginia R. R. Co.

A. I am the secretary of the Parkersburg Branch R. R. Co. and have been such since its organization, in 1865. I was the acting secretary of the Northwestern Virginia R. R. Co. from October, 1864, until it was reorganized and merged in the Parkersburg Branch R. R. Co., in 1865.

2nd Q. Have you in your custody the minute books of the Northwestern Virginia R. R. Co.?

A. I have, and the same have been in my custody since 1864.

3rd Q. State whether the printed copy marked as Exhibit "Y," with the answer of the Baltimore & Ohio R. R. Co. in this cause, is a true copy of the propositions and agreements as appears on the minute book of the Northwestern Virginia R. R. Co. in your custody?

A. They are.

96 4th Q. State whether the minute book of the Northwestern Virginia R. R. Co. contained any order or resolution authorizing Peter G. Van Winkle, the then president of the Northwestern Virginia R. R. Co., to give the assent of said company to said propositions and agreements dated July 22, 1864.

A. It does under the proceedings of the board of directors of that company held July 18, 1864, and recorded on page 131 of the minute book. A copy of so much of said minutes as relates to the subject of the question, certified by me as secretary, are filed here-

with as part of this deposition, marked "W. W. Van Winkle No. 1."

5th Q. State whether any report was made by President Van Winkle to the board of directors of the execution by him of said agreement on behalf of the Northwestern Virginia R. R. Co.; and, if so, please file a certified copy of the proceedings of said board of directors showing that such report was made and the action of the board thereon.

A. There was such a report made at the meeting of the board held on March 15, 1865, and recorded on the minute book on pages 138 and 139. A copy of the whole of the proceedings at that meeting, certified by me as secretary, I file herewith as a part of my deposition, marked "W. W. Van Winkle No. 2."

6th Q. State whether after the sale of the property and works of the Northwestern Virginia R. R. Co. under the deed of trust or mortgage of March 21, 1853, to the city of Baltimore the Northwestern Virginia R. R. Co. continued in existence and carried on any business.

A. It did not. It was succeeded by the Parkersburg Branch R. R. Co.

Objection.—The plaintiff, by counsel, objects to the taking of the above deposition and to the use thereof in this cause at this time because this cause has long since been submitted to the court for a decree therein, the pleadings and proof taken and filed
97 therein, as appears by an order of said court made and entered in said cause, and it is now incompetent for the defendant to take testimony herein to change or affect the case as it stood when argued and submitted to the court; and the plaintiff further objects and excepts to said deposition and to the exhibits therewith because the same are immaterial and irrelevant to the issues in the cause and are improper testimony against the plaintiff for reasons appearing on their face; and, without waiving any of said objections, plaintiff, by counsel, proceeds to cross-examine the witness.

Cross-examination:

7th Q. Is the minute book to which you refer, containing alleged proceedings of the Northwestern V. V. Co., the book containing the original entries of the minutes of the board of directors of said company?

A. Yes.

And further this deponent saith not.

W. W. VAN WINKLE.

I, Levin Smith, a notary public in and for the county of Wood, State of West Virginia, do hereby certify that the foregoing deposition of W. W. Van Winkle was by me, in the presence of said Van Winkle, reduced to writing, and that said deposition was

sworn to and subscribed by him in my presence, pursuant to the annexed notice, at the time and place in said notice specified.

LEVIN SMITH,
Notary Public for Wood Co., W. Va.

Costs, $3.25.

EXHIBIT "W. W. VAN WINKLE No. 1."

The following is a copy of so much of the proceedings of the board of directors of the Northwestern Virginia Railroad Company as is referred to by said W. W. Van Winkle in his testimony at said directors' meeting held "Wednesday, July 18th, 1864:"

98 At a meeting of the board held at the president's office of the The First National Bank of Baltimore—present, the president, Messrs. Hopkins, O'Donnell, McKim, Kayser, Deford, and Swann—it appearing that all the members who could be communicated with in time had been notified of the time and place of this meeting, the minutes of the last meeting were read and approved.

The president laid before the board certain propositions which he stated had been submitted by him to the commissioners of finance of the city of Baltimore and to the Baltimore and Ohio Railroad Company with a view to close the negotiations heretofore pending for a transfer of the interest of the city of Baltimore, as guarantor and creditor of this company, as the basis of a more formal contract to be hereafter prepared and executed as therein provided, and that it was understood that the same would be assented to by the said parties; upon consideration whereof, it was unanimously—

Resolved, That the president is hereby authorized to give the assent of this company, under their corporate seal and his official signature, to the proposed arrangement between the city of Baltimore and the Baltimore and Ohio Railroad Company, and particularly to the "propositions to constitute the basis of an agreement between the Baltimore and Ohio and the Northwestern Virginia Railroad Companies," constituting part thereof, and that the propositions this day laid before the board by the president be entered at large upon the minutes of this meeting.

Resolved, That when the formal assent of the city of Baltimore, by her commissioners of finance, and the Baltimore and Ohio Railroad Company *are* given to the proposed arrangement between those parties, and the assent of the latter is given to the proposed basis of an agreement between them and this company, the president is hereby authorized and directed to take such steps as may be necessary or desirable on the part of this company to carry the
99 said proposed arrangements into full effect.

The following is a true copy of the propositions laid before the board by the president and above directed to be entered at large upon the minutes:

(The "propositions" and "(A)" here follow on the minute book in the words and figures as printed in the pamphlet filed with the

Baltimore & Ohio Railroad Company's answer, referred to as Exhibit "Y."

* * * * * * *

On motion, the board adjourned.

P. G. VAN WINKLE, *President.*

EXHIBIT "W. W. VAN WINKLE No. 2."

And also the proceedings in full of said board of directors at their meeting held—

WEDNESDAY, *March 15th*, 1865.

At a meeting of the board held at the residence of William McKim, Esq., in the city of Baltimore—present, the president, Messrs. Hopkins, O'Donnell, McKim, Keyser, Deford, and Swann—it appearing that all the members who could be communicated with in time had been notified of the time and place of this meeting, the minutes of the last meeting were read and approved.

The president informed the board that the "propositions to constitute the basis of an agreement between the Baltimore and Ohio and Northwestern Virginia Railroad Companies," as recorded on the minutes of the meeting of the eighteenth of July last, had, under the authority given at that meeting, been duly executed on the part of this company, and also on that of the Baltimore and Ohio Railroad Company, on the twenty-second of that month, the agreement of the mayor and the city council of Baltimore and the latter company, also recorded on the minutes, of which the said propositions were part, having been duly executed on the
100 day preceding, and that, as provided in the fifth of the said propositions, the works and property of this company had, on the fifteenth day of February last, been sold under the deed of trust to the mayor and city council of Baltimore, being the first mortgage thereon, and purchased by the Baltimore and Ohio Railroad Company, in trust for themselves and the bondholders, creditors, and stockholders of this company, who assented to the terms of the said propositions, the said works and property to be held by the said trustee until new certificates of stock can be issued in conformity therewith, as provided in the said fifth proposition, and that the said purchaser had adopted as the legal designation of the new corporation the name of "The Parkersburg Branch Railroad Company."

The president further informed the board that by operation of law, upon the conveyance to the said purchaser of the said works and property, this company would be thereby dissolved, except that they may still sue and be sued and make proper disposition and distribution of any assets of the company which did not pass to the said purchaser by the said sale, retaining for that purpose and to that extent their corporate powers, but that such conveyance had not been made.

The president laid before the board a printed copy of a circular

addressed "To the holders of unendorsed bonds, other creditors and stockholders of the Northwestern Virginia Railroad Company," bearing date on the twenty-eighth day of September last, which he had prepared, caused to be printed in connection with the propositions it refers to, and circulated as widely as possible among those interested under authority of a resolution of the board unanimously adopted on the eighteenth day of July last, authorizing and directing him to take such steps as may be necessary or desirable on the part of this company to carry the arrangement contemplated by the said propositions into full effect; whereupon the said circular and the said action of the president were unanimously approved.

101 The president laid before the board some entries and an accompanying note made on the books of the company, under date of the eighteenth of November last (Journal, page 360), intended to correct and complete the ledger accounts connected with the notes and their renewals issued to certain English parties in payment for the iron rails first purchased by the company and the bonds hypothecated to secure their payment, the difficulty arising from the death of the trustee, George Brown, Esq., who, after making sale of the hypothecated bonds or a large portion of them and applying the proceeds to the payment of the notes and the accrued interest and expenses, had died in the fall of 1859 without rendering to the company an account of the particulars of his transactions, his representatives, after a careful scrutiny of his books and papers, being unable to supply them; and it appearing that, as the result of the proposed entries, the books would show the balance due to each of the parties from whom the said rails were purchased, ascertained from other sources of information, the same, with the accompanying note, were unanimously approved.

On motion, the following resolution was unanimously adopted:

Resolved, That the president is hereby authorized and requested to close up the business of the company as soon as practicable, and that for that purpose *we* (he) have the custody and control of all the books, papers, and effects of the company, and that he is further authorized, at such time as he shall think proper, to destroy all cancelled or *i*nissued bonds, notes, coupons, and other securities of the company which are now or may hereafter be in his custody or control and deposit the residue of the books and papers with the Parkersburg Branch Railroad Company.

On motion of Mr. Swann, the following resolution was unanimously adopted:

Resolved, That Messrs. McKim, O'Donnell, and Deford be appointed a committee to communicate to the president the

102 acknowledgments of the board for his valuable services to the company since its organization, and to express their high appreciation of the zeal, energy, and fidelity with which the important interests confided to him have been protected and administered.

On motion, the board adjourned.

P. G. VAN WINKLE, *President.*

I, W. W. Van Winkle, secretary of the Parkersburg Branch Railroad Company, hereby certify *the* the original record books of the proceedings of the stockholders and board of directors of the Northwestern Virginia Railroad Company are in my custody, and that the foregoing are true copies from the proceedings of the board of directors of said last-named company at their meetings on July 18th, 1864, and March 15th, 1865, respectively.

W. W. VAN WINKLE,
Secretary Parkersburg Branch Railroad Company.

And on another day, to wit, on the 7th day of February, 1889, the following order was made and entered of record, to wit:

WILLIAM H. MATTINGLY'S ADMINISTRATOR, &c.,
vs.
BALTIMORE & OHIO RAILROAD CO. *et als.* } In Equity.

This day came the parties, by their counsel, and this cause was argued in writing and submitted to the court, and the court takes time to consider of its decree herein until a future day of this term.

And on another day, to wit, on the 10th day of July, 1889, the following order was made and entered of record, to wit:

WILLIAM H. MATTINGLY'S ADM'R
vs.
N. W. VA. R. R. CO. } In Equity.

The bill and exhibits herein having been read and con-
103 sidered and the cause having been submitted, it is ordered that the bill be dismissed for the want of equity, with costs.

And on another day, to wit, on the 2nd day of January, 1891, the following order was made and entered of record, to wit:

WILLIAM H. MATTINGLY'S ADM'R
vs.
THE NORTHWESTERN VIRGINIA RAILROAD CO. } In Equity.

The plaintiff in this cause, deeming himself aggrieved by the decree herein on the 10th day of July, 1889, dismissing his bill with costs, moved the court to allow him an appeal to the Supreme Court of the United States; which appeal is allowed upon the plaintiff giving bond, with good security, before one of the judges of this court, in the penalty of three hundred dollars, conditioned as the law directs.

And on another day, to wit, on the 7th day of January, A. D. 1891, the following bond was filed in the clerk's office of said court:

Know all men by these presents that we, Thomas C. Mattingly, administrator for Wm. H. Mattingly, deceased, as principal, and W. N. Miller, as surety, are held and firmly bound unto the Northwestern Virginia Railroad Company *et al.* in the full and just sum of three hundred dollars ($300.00), to be paid to the said The Northwestern Virginia Railroad Company *et al.*, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a circuit court of the United States for the district of West Virginia, at Parkersburg, in a suit depending
104 in said court between William H. Mattingly's administrator and The Northwestern Virginia Railroad Company *et al.*, a decree was rendered against the said Wm. H. Mattingly's administrator, and the said William H. Mattingly's administrator having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Northwestern Virginia Railroad Company *et al.*, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said William H. Mattingly's administrator shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

THOS. C. MATTINGLY, *Adm'r*, [SEAL.]
By W. N. MILLER, *His Att'y.* [SEAL.]
W. N. MILLER. [SEAL.]

Sealed and delivered in presence of—
MYER NEWBERGER.

Approved by—
J. J. JACKSON,
U. S. Dist. Judge.

Jan'y 13th, 1891.

105 UNITED STATES OF AMERICA, }
District of West Virginia. }

I, L. B. Dellicker, clerk of the circuit court of the United States within and for said district, do hereby certify that the foregoing is a true copy of the record and proceedings in the case of William H. Mattingly *vs.* The Northwestern Virginia Railroad Company *et al.*, as appears of record and on file in my said office.

In testimony whereof I hereunto set my hand and affix the seal

of said court, at Parkersburg, in said district, on this the 16th day of April, A. D. 1891.

{Seal Circuit Court United States, District West Virginia, Parkersburg, West Va.}

L. B. DELLICKER,
Clerk Circuit Court United States, Dist. West Va.

Fee for transcript, $50.00.

Teste: L. B. DELLICKER, *Clerk.*

Endorsed on cover: Case No. 14,598 West Virginia C. C. U. S. No. 140. T. C. Mattingly, administrator of William H. Mattingly, deceased, appellant, *vs.* The Northwestern Virginia Railroad Company, The Parkersburg Branch Railroad Company, & The Baltimore & Ohio Railroad Company. Filed April 27, 1891.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894

No. 140

T. C. MATTINGLY, ADM'R OF THE ESTATE OF WILLIAM H. MATTINGLY, DECEASED, APPELLANT,

vs.

THE NORTHWESTERN VIRGINIA RAILROAD COMPANY, ETC., THE BALTIMORE & OHIO RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Motion to Dismiss the Said Appeal.

And now comes the Baltimore and Ohio Railroad Company by its counsel, appearing in that behalf, and moves the court to dismiss the appeal in the above entitled cause, for want of jurisdiction, because the value and amount of the matter in dispute does not exceed

five thousand dollars exclusive of costs, but is only for the sum of $2,700, as demanded in the bill of complaint, being the amount of eighteen coupons of fifteen dollars each on ten bonds set out and described in the bill of complaint.

JOHN A. HUTCHINSON,
Counsel for appellee, the Baltimore and Ohio Railroad Company, for the purpose of this motion.

NOTICE OF MOTION TO DISMISS THE SAID APPEAL:

In the Supreme Court of the United States,

October Term, 1894.

No. 140.

To Mr. W. L. Cole, Counsel for Appellant:

Please take notice that on Monday, the 5th day of March, 1895, at the opening of the court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

JOHN A. HUTCHINSON,
Counsel for the Baltimore & Ohio R. R. Co., Appellee for the purpose of said motion.

Argument in Support of Said Motion.

FIRST. This was a suit in equity commenced by the decedent, William H. Mattingly, against the appellee, in the Circuit Court of the county of Wood, State of West Virginia, on the 24th day of February, 1869. The suit was removed on petition of the Baltimore and Ohio Railroad Company to the Circuit Court of the United States for the District of West Virginia, in 1879.

and was docketed in the last mentioned court, in which the issue was made up and proceedings were had therein, as shown by the Record, until the final decree entered in said cause on the 10th day of July, 1890. No plea, no motion, no objection in any form, was filed or pres nted, in the Circuit Court to its entertaining jurisdiction of said cause. For the first time that question is raised here, in the the brief of appellant's counsels.

The bill of complaint, pages 3, 4, 5, 6 and 7, of the Record, was filed by the decedent claiming that he was the owner and had possession of ten bonds issued by the North Western Virginia Railroad Company, secured by mortgage bearing date the first day of January, 1855, for $500 each, with coupons attached of fifteen dollars each, payable semi-annually. The bill shows and alleges that there were two previous mortgages made by the North Western Virginia Railroad Company, known as first and second mortgages, bearing date the 21st day of March, 1853, the first to secure bonds of the North Western Virginia Railroad Company, to the amount of $1,500,000, and the second to secure the Baltimore ond Ohio Railroad Company, to the amount of $1,000,000 in bonds of the said North Western Virginia Railroad Company, which mortgages are copied in the Record, pages 7 and 11.

The bonds claimed to be held by the decedent in his bill under the THIRD MORTGAGE, recites that it is made subject to the said *first* and *second* mortgages.

The *third* mortgage is set out, pages 14 and 15 of the Record, and recites as follows: "Whereas, the said parties of the first part are about to issue their bonds or certificates of loan in various amounts not exceeding in the whole two million, with coupons thereto attached for the interest falling due thereon semi-annually, accounting from the first day of Janu-

five thousand dollars exclusive of costs, but is only for the sum of $2,700, as demanded in the bill of complaint, being the amount of eighteen coupons of fifteen dollars each on ten bonds set out and described in the bill of complaint.

JOHN A. HUTCHINSON,
Counsel for appellee, the Baltimore and Ohio Railroad Company, for the purpose of this motion.

NOTICE OF MOTION TO DISMISS THE SAID APPEAL:

In the Supreme Court of the United States,

October Term, 1894.

No. 140.

To Mr. W. L. Cole, Counsel for Appellant:

Please take notice that on Monday, the ~~13th~~ day of February, 1895, at the opening of the court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

JOHN A. HUTCHINSON,
Counsel for the Baltimore & Ohio R. R. Co., Appellee for the purpose of said motion.

Argument in Support of Said Motion.

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The *third* mortgage is set out, pages 14 and 15 of the Record, and recites as follows: "Whereas, the said parties of the first part are about to issue their bonds or certificates of loan in various amounts not exceeding in the whole two million, with coupons thereto attached for the interest falling due thereon semi-annually, accounting from the first day of Janu-

ary, 1855, on which day the said bonds will bear date, *until the first day of January, 1885, at which time the said bonds will mature and become payable*, and whereas the parties of the first part have caused the said bonds and coupons to be prepared in the following words and figures, that is to say :" [Here the forms of the bond and coupons are given.]

By reference to this mortgage, page 15 of the Record, it will be seen that no provision is made for the foreclosure of said mortgage in case default be made in *the non-payment of interest*, and no right of action upon the bonds could accrue until their maturity, on or after the first day of January, 1885, *thirty years from the date of their issue*.

The bill of complaint makes no such charge or claim, but simply avers as follows, page 4 of the Record: "Your orator further represents that he is the owner and has now in his possession bonds dated January first, 1855, Nos. 4063, 4064, 4065, 4066, 4067, 4068, 4069, 4070, and also bonds Nos. 4562 and 4619, and each are for the sum of $500 each, with coupons attached of fifteen dollars each, payable semi-annually."

"Your orator further represents that there are now "due and unpaid on each of said bonds, eighteen cou- "pons of fifteen dollars each, making now due on each "bond $270.00, and the total amount due your orator "on said bonds $2,700."

It will thus be seen that the matter in dispute is the amount of coupons due at the time of filing the bill in said cause, to-wit: $2,700. The prayer of the bill is to the effect that the court will grant a decree for the amount of the money due upon the bonds aforesaid, and secured by the said third mortgage. Therefore, it is plain the amount is insuffi-

cient to bring this cause within the jurisdiction of this Honorable Court.

SECOND. The appeal in this case was not perfected until the citation was issued on the 17th day of April, 1891. Record, p. 1.

It is respectfully submitted that this court has no jurisdiction to review the decree in this cause, or to review any question of jurisdiction of the Circuit Court of the United States, under the act of February 25th, 1889, Sec. 1, which provides, "that in all cases where a final judgment or decree shall be rendered in the Circuit Court of the United States in which there *shall have been* a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review said judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of $5,000 the Supreme Court shall not review any question raised upon the Record, except such question of jurisdiction, &c."

25 U. S. Stat., 693.

The transcript of the Record shows that there was no question involving the jurisdiction of the Circuit Court presented or raised in any form by the appellant, and no suggestion at any time made, so far as the Record shows, that that court was without jurisdiction.

By the acts of March 3rd, 1891, Sec. 5, it is provided, "That appeals or writs of error may be taken from the District Courts or from the Circuit Courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone should be certified to the Supreme Court from the court below for decision." By Section 14 of that act, "all

acts and parts of acts relating to appeals or writs of error inconsistent with the provisions by appeals or writs of error in the preceding sections 5 and 6 of this Act are repealed."

26 U. S. Stat., 827-829.

The provision of the Act of February 25th, 1889, and Section five of the Judiciary Act of March 3rd, 1891, have been considered by this Honorable Court. In Maynard vs. Hecht, 151 U. S., 324, the Chief Justice delivering the opinion of the court says: "Under Sec-"tion 5 of the Judiciary Act of March 3, 1891, a writ of "error can be taken directly to this court from the Cir-"cuit Courts *only* in the six classes of cases therein "mentioned, and the contention is that the writ may be "sustained in this case as falling within the *first* class "described in that section as follows: 'In any case in "which the jurisdiction of the court is in issue; in such "case the question of jurisdiction alone should be cer-"tified to the Supreme Court from the court below for "decision.'"

"According to that provision the question involving "the jurisdiction of the Circuit Court *must have been in "issue and decided against the party seeking to bring it be-"fore this court for determination*, and must be certified "for decision. And as no such question was certified "by the Circuit Court in this case, we are confronted "on the threshold with the inquiry, whether we can "take the jurisdiction of the writ, an inquiry controlled "by the rule that an affirmative description of the ap-"pellate jurisdiction of this court in a suit implies a "negative on the exercise of such appellate power as "is not comprehended within it." And after quoting the Act of February 25th, 1889, the Chief Justice adds: "The Act of 1891 was framed in this regard in view of "the former Act, and Section 5 restricts the power of "this court in all suits in which its appellate jurisdic-

"tion is invoked by reason of the existence of a ques-
"tion involving the jurisdiction of the Circuit Court
"over the case, to the review of that question only."

"The Act did not contemplate several appeals in
"the same suit at the same time, but gave to the party
"to a suit in the Circuit Court *where the question of the*
"jurisdiction of the court over the parties, the subject was
"raised and put in issue upon the record at the proper time
"and in the proper way, the right to a review by this
"court after final judgment or decree against him, and
"a decision upon that question only, or by the Circuit
"Courts of Appeals, on the whole case."

The court in that case further held that the Supreme Court could not take cognizance of any question of jurisdiction of the Circuit Court under the Act of March 3, 1891, unless it is presented in the form of a certificate by the Circuit Court presenting such question for the determination of the Supreme Court, and that the absence of such certificate is fatal to the maintenance of the writ of error or appeal. That where there is no such certificate of the Circuit Court presenting a question of its jurisdiction to this court for determination, this court cannot review the case upon that question; and the absence of such certificate cannot be helped out by a resort to the petition or to the assignment of errors.

Congress, by Section 14 of the Acts of 1891 having repealed all Acts relating to appeals and writs of error inconsistent with the provision for review by appeal or writ of error, in the preceding sections 5 and 6 of that Act, restricts the power of the Supreme Court to review the question involving the jurisdiction of the Circuit Court, over cases where the amount in controversy is less than $5,000, to the particular method prescribed in the Act of 1891.

Texas Pacific Railway Co. vs. Saunders, 150 U. S., 105.

Texas Railway Co. vs. Horn, 151 U. S., 110.

In Moran vs. Hagerman, 154 U. S., 329, this court re-affirms the construction given to the Acts of 1889 and 1891, holding that where no question of jurisdiction of the Circuit Court is certified to this court for decision, an appeal from that court on the ground of the want of jurisdiction, will be dismissed.

If the appeal should be regarded as taken prior to the passage of the Act of March 3, 1891, still the same consequence must follow from the fact that no issue was made upon the question of jurisdiction in the Circuit Court under the Act of Febauary 25, 1889.

No question involving the jurisdiction of the Circuit Court, having been *in issue* and *decided against the appellant* in this cause, and *certified* by the Circuit Court to this court, it is respectfully submitted that the appeal in this case should be dismissed.

JNO. A. HUTCHINSON,

Counsel for Appellee, the Baltimore & Ohio R. R. Co., on the said motion to dismiss.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

T. C. MATTINGLY, ADMINISTRATOR OF W. H. MATTINGLY, DECEASED, APPELLANT,

vs.

THE NORTH WESTERN VIRGINIA RAILROAD COMPANY AND OTHERS, APPELLEES.

No. 140.

Brief for Appellant in Opposition to Motion to Dismiss.

The motion is predicated upon the assertion that the amount in controversy is less than $5,000.00. The bill alleges ownership in the complainant in the court below, appellant here, of ten bonds of the value of $500.00 each, but the bonds not being due at the date of the filing of the bill he prayed a decree for the interest coupons then due, which amounted to $2,700.00. One of the questions made by the bill is, that the complainant has a lien upon

certain real estate alleged in the bill to be of the value of $16,339.00 for the payment of the bonds so held by him, and that the said real estate was in possession of and claimed by the B. & O. R. R. Company under a sale to it, alleged in the bill to be void, and the bill prays that the sale to the B. & O. Company may be set aside and the mortgage under which complainant holds may be foreclosed, and the property sold to pay the debt to complainant, or divided amongst the parties entitled thereto. (Rec., pp. 6 and 7.) Under the circumstances the value of the property should be considered the amount in controversy, rather than the particular amount of interest due complainant at the time of the institution of the suit.

But as the court below clearly had no jurisdiction of the case, and as this court has jurisdiction under the act of February 25, 1889 (25 Stat., 693), to review that question regardless of the amount in controversy, it is unnecessary to consider that question.

It is contended by the appellee that the appeal was not taken until the 17th day of April, 1891, when the citation was served, and that it must be governed by the act of March 3, 1891. But—

The appeal was taken on the 2d day of January, 1891, when the order was entered in the court below granting the appeal.

The final decree was entered in the court below on the 10th day of July, 1889. (Rec., p. 68.) On the 2d day of January, 1891, on motion in open court, an appeal from that decree was allowed by the court "upon the plaintiff giving bond, with good security, before one of the judges of this court, in the penalty of three hundred dollars, conditioned as the law directs." (Rec., p. 68.)

On the 13th day of January, 1891, a judge of the court below approved the bond. (Rec., pp. 68 and 69.) On the 14th day of April, 1891, the judge signed the citation which was served on the appellee's counsel on the 17th of the same month, and on the 27th day of April, 1891, the record was filed in this court.

The approval of the bond by the judge in pursuance of the order granting the appeal, completed the appeal and conferred jurisdiction of the case upon this court. Neither the signing or service of the citation were jurisdictional. The only office of the citation was to give notice to the appellees.

Dayton *vs.* Lash, 94 U. S., 112.
Dodge *vs.* Knowles, 114 U. S., 438.
Hewitt *vs.* Filbert, 116 U. S., 142.
Jacobs *vs.* George, 150 U. S., 415.

The appeal having been taken prior to the passage of the act of March 3, 1891, is not governed by that act, but by the act of February 25, 1889 (quoted in appellee's brief), which was in force at the time the appeal was taken.

Under the last mentioned act it is not necessary, in order to give this court jurisdiction where the amount in controversy is less than $5,000, that the question of jurisdiction should have been raised in the court below by any plea or motion. If the record fails as it does in this case, to affirmatively show jurisdiction in the court below, it is the duty of this court to take jurisdiction and reverse the decree or judgment below. In such case, under the uniform decisions of this court, there is error apparent upon the face of the record which this court is bound to notice, whether assigned as error or not.

Chapman *vs.* Barney, 129 U. S., 681.
Denny *vs.* Pironi, 141 U. S., 121.
Roberts *vs.* Lewis, 144 U. S., 653.
N. P. R. R. Co. *vs.* Walker, 148 U. S., 391.
Mississippi Mills *vs.* Cohn, 150 U. S., 202.
Empire Coal & Trans. Co. *vs.* Empire Coal & Mining Co., 150 U. S., 159.

In the case of Chapman *vs.* Barney (129 U. S., 681) it is said: "But aside from all this, we are confronted with the question of jurisdiction, which, although not raised by either party in the court below or in this court, is presented by the record, and under repeated decisions of this court must be considered. [Citing a series of cases from 6 Wheaton to Stevens *vs.* Nichols, 127 U. S.] The ground upon which the jurisdiction of the Federal Court is invoked is that of divers citizenship of the parties. In Robertson *vs.* Cease (97 U. S., 646–649) it was said that 'where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively, and with equal distinctness, in other parts of the record.'"

The case of Denny *vs.* Pironi (141 U. S., 121) was a writ of error under the act of February 25, 1889, where the amount in controversy was less than $5,000.00. The jurisdiction was claimed on the ground of divers citizenship, but this was not sufficiently alleged in the declaration, the case having been originally instituted in the Circuit Court of the United States for the Northern District of Texas. Nor did the record anywhere show the necessary jurisdictional facts. The parties proceeded to trial and judgment without raising the question of jurisdiction. After judgment the plaintiff in error moved in arrest of judgment on the ground of want of jurisdiction

which motion was overruled. The judgment was reversed, the court laying no stress upon or even mentioning in its opinion that it gave any consideration to the fact that such motion had been made in the court below.

In Roberts *vs.* Lewis (144 U. S., 653), decided April 25, 1892, it was said: "When ever the jurisdiction of the Circuit Court of the United States depends upon the citizenship of the parties, it has been held from the beginning that the requisite citizenship should be alleged by the plaintiff, and must appear of record; and when it does not so appear this court, on writ of error, must reverse the judgment, for want of jurisdiction in the Circuit Court."

The case of Northern Pacific R. R. Company *vs.* Walker (148 U. S., 391), a suit in equity against Auditors of twelve counties to enjoin collection of taxes where no one amount was equal to $2,000.00, proceeded to a decree dismissing the bill for want of equity, and an appeal was taken to the Circuit Court of Appeals of the 8th Circuit, and that court certified certain questions to the Supreme Court, whereupon the whole record was brought to the last mentioned court by *certiorari*, and the decree of the Circuit Court was reversed at the cost of appellant for want of jurisdiction. The question of jurisdiction was not raised in the Circuit Court, or Court of Appeals, and was raised by this court *sua sponte*.

In Mississippi Mills *vs.* Cohn (150 U. S., 202) the bill was dismissed by the Circuit Court on the ground that it had no jurisdiction *in equity*. The record did not show the ground of dismissal, but only the opinion of the judge published in the Federal Reporter. The amount in controversy was less than $5,000. This court took jurisdiction under the act of February 25, 1889, and decided that the Circuit Court had jurisdiction in equity and of the parties on the ground of divers citi-

zenship and reversed the decree dismissing the bill and remanded the case to be further proceeded in in the Circuit Court, but expressed no opinion on the merits.

In the case of Empire Coal and Trans. Co. *vs.* Empire Coal and Mining Co. (150 U. S., 159), at page 163, it is said: "If the parties are not citizens of different States there is an entire want of jurisdiction, which cannot be waived by the parties, but will be noticed by the court of its own motion."

That the record in this case not only fails to show the necessary divers citizenship of parties, but on the contrary shows affirmatively that the real parties to the controversy were all citizens of West Virginia, is shown by appellant's brief on that question. (pp. 5 to 14.)

W. L. COLE,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

T. C. MATTINGLY, &c., APPELLANT,

vs.

NORTH WESTERN VIRGINIA RAILROAD COMPANY, &c., APPELLEES.

OCTOBER TERM, 1894.

No. 140.

Brief of Appellee in reply to Brief of Appellant on Motion to Dismiss.

1. The amount in controversy is less than $5000, to wit: $2700. The fact that the appellant claims the benefit of the mortgage to secure the interest on bonds, the interest being the said amount of $2700, does not avail the appellant on this point of jurisdiction. The precise question was before this court in Elgin vs. Marshall, 106 U. S., 578, in which suit was brought against the defendant Elgin on coupons for $1600,

being the interest due on $7500 of bonds held by the plaintiff. This court held that it had no jurisdiction, the claim being but for $1600. To the same effect is New Jersey Zinc Company vs. Trotter, 108 U. S., 564.

In Bruce vs. Manchester, &c., Railroad, 117 U. S., 514, this court held that the matter in dispute on which the jurisdiction of this court depends is the matter which is directly in dispute in the particular case in which the judgment or decree sought to be reviewed has been rendered, and that we are not permitted for the purpose of determining its amount or value, to estimate its collateral effect in a subsequent suit between the same or other parties. That was a case in which suit was brought for the purpose of collecting interest on bonds of a railroad secured by mortgage to trustees covering a series of bonds amounting in the aggregate to $500.000. The plaintiff owned $7500 of bonds, and the interest claimed amounted to no more than $3000.

In the opinion of Chief Justice Waite, he says: "On the case as it stood when the bill was dismissed, the only matter directly involved was the right of Bruce to have the mortgaged property sold to pay the amount due for interest on bonds held by them. This is all that has been denied. It follows that the matter in dispute here is less than our jurisdictional limit." The same point had been held in Opelike City vs. Daniel, 109 U. S., 108.

So much then for the question of jurisdictional amount on motion to dismiss.

2. If our position is correctly taken that the amount in dispute is less than $5000, then in order to raise the question of jurisdiction of the Circuit Court on this appeal, it must appear by the language of the Act February 25th, 1889, 25 Revised Statutes, 693, that there was a question in the Circuit Court involving the jurisdiction of that court before the appellant can

raise that question in the Supreme Court of the United States. If there had been no question involving the jurisdiction of the Circuit Court, there can be no appeal, for the amount in dispute is less than $5000. If it were otherwise and the appeal could be taken under the Act February 25th, 1889, merely to raise the question of jurisdiction in this court, the language used in the act would have been different, If the appellant is correct, that language should have been : "That in all cases where a final judgment or decree shall be rendered in the Circuit Court of the United States, whether the question of jurisdiction was involved or not, &c." That act only intends that a question of jurisdiction shall be raised and determined by the Circuit Court, and that question can be taken to the Supreme Court regardless of the amount in dispute.

It is the fact that such a question was *involved in the Circuit* Court that justifies the right of appeal where the amount is less than $5000.

The brief of appellants counsel on this motion, urges that it is unnecessary in order to give this court jurisdiction where the amount in dispute is less than $5000, that the question of jurisdiction of the Circuit Court should have been presented in that court.

In support of this view reference is made to Chapman vs. Barney, 129 U. S., 681. This decision was rendered prior to the Act of February 25th, 1889. Besides the amount in controversy in that suit was $14,000 and the question of jurisdiction was presented and decided in the court below.

In Denny vs. Pironi, 141 U. S, 122 the question of jurisdiction was raised directly before final judgment.

In Roberts vs. Lewis, 144 U. S., 653, the amount in dispute exceeded $5000 (p. 654). So, the question arose here in a cause in which this court had jurisdiction of the whole case.

The case of N. P. Ry. Co. vs. Walker, 148 U S. 391, does not apply to the case in hand, because it and the case on which it is based *i. e.* Walton vs. N. Est. Ry. Co., 140 U. S., 370, came up under the Act of March 3, 1891, and the question of jurisdiction was directly presented in the Circuit Court. This seems fairly inferrible from the opinion 148 U. S., 392.

In Mississippi vs. Cohn, 150 U. S., 202, the question of jurisdiction appears from the report, to have been presented and determined in the Circuit Court.

In Empire Co. vs. Empire Co., 150 U. S., 159, there was a demurrer for want of jurisdiction.

The foregoing cases are all that are cited by appellant in support of his contention that this court can review the right of the court below to entertain the cause, whether that question was considered by that court or not.

It is respectfully submitted that for the reasons, and upon the authorities cited in our original brief on this motion, the appeal should be dismissed.

JNO. A. HUTCHINSON,

Of Counsel for Baltimore & Ohio Railroad Co.

IN THE

Supreme Court of the United

OCTOBER TERM, 1888.

No. 1,408.

T. C. MATTINGLY, ...

THE C. ...

THE NORTHWESTERN ...
PANY, THE ...
COMPANY, THE ...
ROAD COMPANY, ...
COUNCIL OF BALTIMORE, ...

...

AN APPEAL FROM THE ... SERVICE FOR THE ...

The case of N.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 140.

T. C. MATTINGLY, ADMINISTRATOR OF W. H. MATTINGLY, DECEASED, APPELLANT,

vs.

THE NORTHWESTERN VIRGINIA RAILROAD COMPANY, THE PARKERSBURG BRANCH RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, AND THE MAYOR AND CITY COUNCIL OF BALTIMORE, APPELLEES.

IN EQUITY.

AN APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Brief in Behalf of the Appellant.

This is a suit in equity commenced by the decedent of the appellant against the appellees in the Circuit Court for the County of Wood, in the State of West Virginia, on the 24th day of February, 1869, and, on petition of the Baltimore and Ohio Railroad Company, removed into the Circuit Court of the United States for the District of West Virginia, which last mentioned court passed a decree dis-

missing the bill with costs. From this decree the appeal was taken.

The objects of the suit are to set aside a sale of the property of the Northwestern Virginia Railroad Company, made under a mortgage or deed of trust; to declare the priority amongst mortgages, and to foreclose the mortgage under which the complainant claimed by a sale of the Company's property and distribution of the proceeds.

The Northwestern Virginia Railroad Company was incorporated by a special act of the General Assembly of Virginia passed the 4th day of February, 1851, to construct and operate, which it subsequently did, a railroad from Parkersburg, on the Ohio River, to and connecting with the Baltimore and Ohio Railroad at a point in Taylor County, over territory lying wholly within what is now the State of West Virginia.

Three mortgages or deeds of trust were executed by the Northwestern Virginia Railroad Company on all its property, present and after acquired, and a fourth one on certain specified property, including certain parcels of real estate the most of which was situated in Wood County. The first two mortgages or deeds of trust were executed on the same day, the 21st day of March, 1853, the first to the City of Baltimore to secure the payment of $1,500,000 twenty year bonds, guaranteed by the said city, and the second to the Baltimore and Ohio Railroad Company to secure the payment of $1,000,000 twenty year bonds guaranteed by the the last named company. After the execution of these two mortgages or deeds of trust, the Mayor and City Council of Baltimore conveyed and assigned all its interest in the first mortgage and all its interest in the property of the Northwestern Virginia Railroad Company to the Baltimore and Ohio Railroad Company.

The third mortgage or deed of trust was given the 1st day of January, 1855, to secure not to exceed $2,000,000 in 30 year bonds. The complainant is the owner of $5,000.00

of the last-mentioned bonds, the payment of which he is seeking to enforce by this suit.

On the 21st day of December, 1857, the said Northwestern Virginia Railroad Company executed to one James Cook a deed of trust conveying certain debts due to it, and also certain specificed parcels of real estate in Wood and other counties through which the road passes, to secure to J. M. Stephenson and others $20,000, with power in the trustee to sell and convey for the payment of the debt, if default should be made at maturity. At the time of the execution of this last deed of trust the Baltimore and Ohio Railroad Company executed a paper assenting thereto, which the complainant claims and alleges in his bill is and operated as a release of all the property therein mentioned from the lien of the first and second mortgages or deeds of trust, and that the third mortgage, under which he claims thereupon, became the first lien upon that property.

On the 24th day of March, 1865, James Cook, trustee in the deed of trust of the 21st of December, 1857, conveyed the lots of lands specified in that deed, after public advertisement and sale thereof, to the Baltimore and Ohio Railroad Company. The bill alleges that this sale is void because sale was made in gross and not in separate lots, and because sold for an inadequate price; and also that, if the sale be valid, the vendee took the same subject to the prior mortgage under which complainant claims.

On the 3d of April, 1865, the Mayor and City Council of Baltimore, claiming to act as trustee in the first mortgage or deed of trust, executed a deed purporting to convey to the Baltimore and Ohio Railroad Company by the name of the Parkersburg Branch Railroad Company, all the property of the Northwestern Virginia Railroad Company, reciting in said deed that the conveyance was made in pursuance of a public sale made on the 15th day of February, 1865, after more than 30 days' notice, at which the Baltimore and Ohio Railroad Company, by the name aforesaid,

was the highest bidder and purchaser at the sum of $32,000. The bill alleges that this sale and conveyance is void for want of power and authority in the Mayor and City Council of Baltimore to make it, and also because of the grossly inadequate price.

The bill thereupon prays that the conveyance by the said Cook to the Baltimore and Ohio Railroad Company of the 24th of March, 1865, and the conveyance by the Mayor and City Council of Baltimore to said company of the 3d of April, 1865, may both be set aside, and that a foreclosure of the third mortgage may be decreed by a sale of all the property of the Northwestern Virginia Railroad Company, and distribution of the proceeds of sale as equity may require.

The answer insists upon the validity of all the mortgages and deeds of trusts, and the sales thereunder, and denies that the release alleged in the bill operated as a release of the first or second mortgage, and denies that complainant is entitled to any relief.

Assignment of Errors.

First. There is error in the decree dismissing the bill because the court below had no jurisdiction of the case, the divers citizenship of the parties, necessary to confer jurisdiction, not being alleged, but the contrary appearing by the record.

Second. The court erred in not granting the relief prayed for in the bill.

(*a*) The first and second mortgages were released as to the property mentioned in the deed of the 21st December, 1857, from the Northwestern Virginia Railroad Company, to Cook, trustee, and the third mortgage is the first lien thereon.

(*b*) The sale of the 15th of February, 1865, and the deed in pursuance thereof from the Mayor and City Council of Baltimore of the 3d of April, 1865, in pursuance thereof, are null and void.

(*c*) The court should have decreed as indicated in (*a*) and

(*b*), and also should have decreed a foreclosure and sale under the third mortgage, and distribution of the proceeds of sale in accordance with the prayer of the bill.

THE COURT BELOW WAS WITHOUT JURISDICTION OF THE CASE.

The bill was filed in the State court in March, 1870 (Rec., p. 3). The answer of the Baltimore and Ohio Railroad Company was filed in September, 1870 (Rec., p. 25), and a general replication thereto on the 8th of the same month (Rec., p. 45), and evidence was taken in 1870 and 1871 (Rec., pp. 49 to 59). The petition of the Baltimore and Ohio Railroad Company for the removal of the case to the Circuit Court of the United States was filed in the State court on the 23d day of January, 1879. (Rec., p. 47.) As there were two terms of the State court per year, several terms of that court, at which the case might have been tried, passed prior to the filing of the petition, so that at that time the petition was filed it was too late to remove the cases under the Act of March 3, 1875, on the ground of a separable controversy between parties of divers citizenship, and this is reocgnized in the affidavit for removal which bases the right of removal on the ground of local prejudice, under the Act of 1867. (See affidavit, Rec., p. 48.) The long delay in the State court was occasioned by reason of the fact that one of the counsel who filed the bill was soon afterwards elected as judge of the State court in which the suit was pending. (Rec., p. 47.)

The case was not removable under the Act of 1867. The complainant and two of the necessary defendants, to wit, the Northwestern Virginia Railroad Company and the Parkersburg Branch Railroad Company were citizens of the State of West Virginia at the time of the institution of the suit, and at the time of the removal thereof. The petition does not aver the requisite citizenship to give the court below jurisdiction, either under the Act of 1867 or that of 1875.

The petition for removal (Rec., pp. 47 and 48), alleges that the Baltimore and Ohio Railroad Company was, at the time of the institution of the suit and the filing of the petition, a citizen of Maryland, and that the complainant was a citizen of West Virginia at the time of filing the petition, but is silent as to his citizenship at the time of the institution of the suit. The petition also alleges that the B. & O. Company "*is one of the defendants and the principal one,*" but it does not allege or show that there was a separable controversy between it and the complainant. Nor does the petition contain any allegation as to the citizenship of the other defendants, either at the time of the institution of the suit or the filing of the petition. Upon looking into the record it appears that there is no separable controversy between the Baltimore and Ohio Railroad Company and the complainant, and that the two West Virginia corporations are necessary parties defendant and interested in the determination of all the questions raised by the pleadings.

It is true that the Northwestern Virginia Railroad Company was created by an act of the legislature of Virginia, passed the 14th of February, 1851, but it was created for the sole purpose of constructing and operating a railroad from Parkersburg in Wood County to a point in Taylor County, through and across certain other counties mentioned in the act, then in Virginia, but all of which are embraced within the territorial limits of the State of West Virginia. (See Acts Gen. Ass. of Va. of 1850–1, pp. 69 and 70).

These counties are embraced in and form a part of the State of West Virginia. (See Constitution of West Va. of 1863, Art 1, Sec. 2). By Section 8 of Art. 11 of the same instrument, it was provided that "Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature." This constitution

was adopted by the people of West Virginia, and on 31st day of December, 1862, Congress passed an act admitting the State of West Virginia into the Union, the act to take effect sixty days after proclamation of the President that certain conditions had been complied with (12 Stats., 633–4). The proclamation of the President was issued the 20th day of April, 1863, declaring the conditions complied with, and the constitution went into operation on the 20th day of June, 1863 (13 Stat. 731–2). And thereupon the Northwestern Virginia Railroad Company, by force of that constitution became a corporation of West Virginia.

When the sale hereinbefore mentioned, of all the property of the Northwestern Virginia Railroad Company, was made by the Mayor and City Council of Baltimore, claiming to act as trustee in the mortgagee or deed of trust to secure the payment of $1,500,000 of bonds (Rec., p. 7–10), on the 15th day of February, 1865, which sale the bill in this cause seeks to set aside, the Baltimore and Ohio Railroad Company became the purchaser in trust for certain purposes, under the name of the Parkersburg Branch Railroad Company. The declaration of the trust and the name under which the property was held is set forth in the deed from the Mayor of Baltimore to the Parkersburg Branch Railroad Company in the following language (See Rec., pp. 20, 21):

> "To have and to hold the work and property hereby granted and conveyed unto the said Baltimore and Ohio Railroad Company, in trust, for the Baltimore and Ohio Railroad Company and the bondholders, creditors and stockholders of the Northwestern Virginia Railroad Company assenting to the terms set forth in certain proposition—to constitute the basis of an agreement between the Baltimore and Ohio and Northwestern Virginia Railroad Companies, bearing date on the twenty-second day of July, in the year eighteen hundred and sixty-four, authenticated by the signatures of the presidents of the said companies, and by the corporate seals

thereof, which said propositions are referred to in, and are made part of a certain agreement between the Mayor and City Council of Baltimore, and the Baltimore and Ohio Railroad Company, bearing date on the twenty-first day of July, eighteen hundred and sixty-four. And the said Baltimore and Ohio Railroad Company, purchaser as aforesaid, and trustee as hereinbefore referred to, being by force of the twenty-eighth section of the sixty-first chapter of the eighteenth title of the Code of Virginia, second edition, 'published pursuant to law' in eighteen hundred and sixty, and now the law of West Virginia, a corporation by any name that may be set forth in this conveyance, does hereby declare that its said corporate name as such purchaser and trustee is 'The Parkersburgh Branch Railroad Company,' and it is hereby declared to be the intent of this conveyance to give the said purchaser by the said title of 'Parkersburgh Branch Railroad Company' all the rights, and to subject it to all the obligations, which are described in the twenty-eighth and twenty-ninth sections of the sixty-first chapter of the eighteenth title of the Code of Virginia, second edition, published pursuant to law in the year eighteen hundred and sixty." . . .

Sections 28 and 29, Chapter 61, of the Code of Virginia referred to in said deed, and Section 30 of the same chapter are as follows:

28. "If a sale be made under a deed of trust or mortgage, executed by a company on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forth-

with be a corporation, by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the court in which the conveyance shall be recorded."

29. "The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties, as would have been had or should have been performed, by the first company but for such sale and conveyance; save only that the corporation so created shall not be entitled to the debts due the first company, and shall not be liable for any debts of or claims against the said first company, which may not be expressly assumed in the contract of purchase, and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding together the amount of stock in the first company, at the time of the sale, and assign the same in a book to be kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for two weeks in a newspaper."

30. "The debts due to and by, and claims against, the said first company mentioned in the preceding section, shall be subject to the provisions contained in the thirtieth section of the fifty-sixth chapter, and the said company, notwithstanding its dissolution aforesaid, shall, as to said debts and claims, have the power and perform the duties prescribed by that section." (Code of Va., 1860, pp. 356–7.)

The 30th section of chapter 56, above referred to, is as follows:

30. "When any corporation shall expire, or be dissolved or its corporate rights and privileges shall

have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property and debt among those entitled thereto." (Same Code, p. 329.)

It is submitted that the effect of the conveyance by the mayor of Baltimore to the B. & O. Railroad Company, under these sections of the law of Virginia, which had become the law of West Virginia by adoption, as stated and admitted in the deed, was the creation of a new corporation of the State of West Virginia by the name of the Parkersburgh Branch Railroad Company, in which was vested by virtue of said sale and deed, if valid, all the property, rights, and franchises of the Northwestern Virginia Railroad Company, and if void then the same remained in the latter company, and no property is, in any event, vested in the B. & O. Company by virtue of said conveyance.

A corporation, created by the laws of one State and afterwards created a corporation by the laws of another State, thereby becomes a domestic corporation of the latter State and cannot remove a suit brought against it in the courts of the latter State into the circuit court of the United States.

RR. Co. *vs.* Vance, 96 U. S., 450.
M. & C. RR. Co. *vs.* Alabama, 107 U. S., 581.
Clark *vs.* Barnard, 108 U. S., 436.
Stone *vs.* Farmer's Co., 116 U. S., 307.
Graham *vs.* RR. Co., 118 U. S., 161.

It appears in the record that, after this sale, the Northwestern Virginia Railroad Company did no more business, and that the Parkersburgh Branch Railroad Company suc-

ceeded to its business and franchise in the operation of said road. (Record, pp. 64 and 67.)

The B. & O. Company's only interest in this litigation is as a creditor of the Northwestern Virginia Company, or as on of the *cestuis que trust* of the property, of which the Parkersburgh Branch Company is the trustee.

In either case there is no separate controversy between the B. & O. Company and the complainant, even if it sufficiently appeared that divers citizenship existed between them at the institution of the suit.

Ayers *vs.* Wiswall, 112 U. S., 187.
Thayer *vs.* The Life Association, 112 U. S., 717.
Stevens *vs.* Nichols, 130 U. S., 230.
Crehore *vs.* O. & M. Railroad Co., 131 U. S., 240.
Wilson *vs.* Oswego Township, 151 U. S., 57 & 67.
Merchants, &c., Co. *vs.* Ins. Co., 151 U. S., 368 & 382.

But even if there were a separable controversy between the Baltimore and Ohio Company and the complainant, and the record showed the necessary diverse citizenship, the application for removal came too late under the Act of 1875. As this cause was pending and at issue when that act was passed, in order to have secured removal under that act, the application should have been made at the first term o the State court after the passage of that act.

Removal Causes, 100 U. S., 473.
Kansas City, &c., RR. Co. *vs.* Daughtry, 138 U. S., 298.
Manning *vs.* Amy, 140 U. S., 137.
Babbitt *vs.* Clark, 103 U. S., 606.
Gregory *vs.* Hartley, 113 U. S., 742.

A suit in equity may be first tried at the term of the State court at which respondent is required to answer, and complainant may be required to file replication.

Pullman Palace Car Co. *vs.* Speck, 113 U. S., 84.

The act of the legislature of West Virginia, fixing terms of the Circuit Court of Wood County, in force when the Act of Congress of March 3, 1875, was passed, and in force when this cause was removed, is as follows:

> "In every year there shall be two regular terms of each circuit court, and the days for the commencement of each of said terms shall be as follows, to wit:
>
> . . . . . .
>
> "For the county of Wood, on the first Monday of March and the first Monday of August."
>
> Acts of the Legislature of W. Va., 1872–3, Ch. XV, Sec. 5, pp. 44–5.

But the removal was not prayed under the Act of 1875, but under the third clause of Section 639, of the Revised Statutes, known as the "Local Prejudice" Act, as shown by the petition and affidavit attached thereto. As the complainant and two of the defendants are citizens of West Virginia, the circuit court of the United States had no jurisdiction under this provision of the law.

Cambria Iron Co. *vs.* Ashburn, 118 U. S., 54.
Hancock *vs.* Holbrook, 119 U. S., 586.
Young *vs.* Parker, 132 U. S., 267.

In the case last cited it is said (pp. 270–1):

> "There was no separable controversy here (Fidelity Insurance Company *vs.* Huntington, 117 U. S., 280; Ayers *vs.* Chicago, 101 U. S., 184, 187), but if there were the provision as to the removal of such a controversy has no application to a removal on the ground of local prejudice, under the Act of March 2, 1867, Ch. 196, 14 Stat., 558, upon which these petitions were based. Jefferson *vs.* Driver, 117 U. S., 272."

"The provisions of that act are reproduced in the third subdivision of Section 639 of the Revised Statutes, and it was and is essential, in order to such removal, where there are several plaintiffs or several defendants, there all the necessary parties on one side must be citizens of the State where the suit is brought, and all on the other side must be citizens of another State or States, and the proper citizenship must exist when the action is commenced as well as when the petition for removal is filed. Sewing Machine Cases, 18 Wall., 553; Vannevar *vs.* Bryant, 21 Wall., 41; Bible Society *vs.* Grove, 101 U. S., 610; Cambria Iron Company *vs.* Ashburn, 118 U. S., 54; Hancock *vs.* Holbrook, 119 U. S., 586; Fletcher *vs.* Hamlet, 116 U. S., 408."

"It does not appear from either of these petitions and affidavits, or elsewhere in the record, that diverse citizenship as to the parties therein named existed at the time of the commencement of the suit, nor that diverse citizenship existed between the complainant and all the necessary defendants at the time the petitions and affidavits were severally filed. The cause was not properly removed and the State court has never lost jurisdiction. Stevens *vs.* Nichols, 130 U. S., 230; Crehore *vs.* Ohio & Mississippi Rwy. Co., 131 U. S., 240, and cases cited."

It is immaterial that no question appears of record to have been made upon the right of removal in the court below.

Thayer *vs.* Life Asso., 112 U. S., 717.
Stevens *vs.* Nichols, 130 U. S., 230.
Crehore *vs.* Ohio, &c., RR., 131 U. S., 240.

The decree should be reversed with costs against the B. & O. Company in this court and the circuit court, the party upon whose petition the removal was made, with directions to the court below to remand the cause to the State court.

See cases cited under the last point and also—

Young *vs.* Parker, 132 U. S., 267.

Graves *vs.* Coburn, 132 U. S., 571; see p. 590.

Kellam *vs.* Keith, 144 U. S., 570.

As this court has no jurisdiction to review the case upon the merits nothing is submitted thereon.

W. L. COLE,

Attorney for Appellant.

See cases cited under

RECORD No. 14,598.

No. 140. *October Term, 1894.*

—IN THE—

Supreme Court of the United States,

T. C. MATTINGLY, Adm'r, &c., Appellant,

AGAINST

THE B. & O. R. R. CO., and others, Appellees.

Brief of Points and Authorities for Appellee, B. & O. R. R. Co.

I.

STATEMENT OF THE CASE.

This was a bill filed by William H. Mattingly, claiming to be the holder of certain mortgage bonds, dated January 1, 1855, alleged to have been secured by a third deed of trust, or mortgage, a copy of which is filed with the bill, and alleging that a sale made by the Mayor and City Council of Baltimore, on the 15th day of February, 1865, under the mortgage deed made to the Mayor and City Council of Baltimore on the 21st day of March, 1853, by the North Western Virginia Railroad Company, was invalid, for the reasons set up in the bill of complaint.

In order to a right understanding of the facts of this case, it may be well to state that the record shows that the Northwestern Virginia Railroad Company in order to secure funds to construct its railroad from Grafton to Parkersburg, under its charter, on the 21st of March, 1853, made a deed of trust, or mortgage, (known as the First mortgage), for the purpose of securing the payment of bonds to be issued by said Company, and to indemnify the *City of Baltimore*, as the guarantor of said bonds, to the amount of one million, five hundred thousand dollars; that said deed was duly acknowledged on behalf of said company, and admitted to record in Wood county, on the line of the road; that afterwards, and as *second* in priority of the encumbrances, the North Western Virginia Railroad Company executed its second mortgage, to secure the payment of bonds to be issued by said company, and to indemnify *the Baltimore & Ohio Railroad Company*, as the guarantor of such last mentioned bonds, to the amount of one million dollars, which was also duly acknowledged and admitted to record; that on the first day of January, 1855, the North Western Virginia Railroad Company executed to James Cook, as trustee, a deed of trust for the purpose therein expressed, (known as the Third mortgage) which was admitted to record on the 25th day of June, 1855.

The authority of the railroad company to pledge its property for the purposes of its work is given by the Act of the General Assembly of Virginia of February 14th, 1851, incorporating the North Western Virginia Railroad Company, so much of which as concerns this subject, is as follows: [Acts, 185—p.——]

"If the capital stock of said company shall be insufficient for the purposes of this act, the said company

shall have power, and are hereby authorized to increase the same by the addition of as many shares as may be deemed necessary; and said company shall have power to borrow money for the purpose of carrying on the object of this act, and to issue proper certificates or evidences of such loans *and to pledge the property of the company for the payment of the same and the interest that may accrue thereon;* and said company shall have power to construct so much of their said railroad as the amount subscribed may allow, and shall have two years from the passage of this act to commence the same."

II.

ANSWER OF THE B. AND O. R. R. CO.

The answer of the defendant, the Baltimore & Ohio Railroad Company, denies that the plaintiff, Mattingly, was the holder of any such bonds, or that they are valid, and calls for proof thereof, and denies that such bonds are the same bonds that are secured by what the bill styles a third mortgage, or deed of trust, or that they constitute a valid or binding lien on the property therein mentioned. *There is no proof of the allegations so denied by the answer.*

It is a fact appearing in the case, and set up in the answer, that the Mayor and City Council of Baltimore executed to the Baltimore & Ohio Railroad Company, a deed of assignment bearing date the 28th day of July, 1864, by which they assigned to the Baltimore & Ohio Railroad Company all the benefit of said deed executed for the security and indemnity of said city, and of all the bonds or obligations which it held on said North Western Virginia Railroad Company, thereby placing the Baltimore & Ohio Railroad Company in its stead, and investing it with all the rights to which the city of

Baltimore was entitled under said deed, or mortgage, and subject to the provisions and exceptions which are mentioned and expressed in said deed of assignment. This deed of assignment was duly executed and admitted to record on the 1st day of October, 1864, in the county of Wood, after it had been recorded in other counties, and is the same, a copy of which is filed with the bill marked "Exhibit D." By this deed of assignment the city of Baltimore, in consideration of the sum of one million two hundred thousand dollars, paid by the Baltimore & Ohio Railroad Company, assigned and transferred to the said company all the right, title and interest, present and prospective, of the city of Baltimore, in and to the indenture of mortgage from the North Western Virginia Railroad Company to the Mayor and city of Baltimore, dated the 21st day of March, 1853 together with the property and effects described therein, the object of which assignment was to substitute the Baltimore & Ohio Railroad Company in the place of the said Mayor and City Council of Baltimore, and to give the B. & O. Railroad Company all the rights which the Mayor and City Council would have had, had they continued to hold the said mortgage, or been obliged to pay the principal and interest of the bonds guaranteed by the said Mayor and City Council; and the said Mayor and City Council covenanted and agreed with the said railroad company, its successors and assigns, that the Mayor and City Council would pay, as the same accrues, the interest due on the bonds aforesaid, and the principal of said bonds at maturity, to the holders thereof, so as to relieve the property and effects of every description, affected by the said mortgage, from all claims and demands that might be brought against the same, to the end that the Baltimore & Ohio Railroad Company might, in virtue of the pay-

ment of the said one million two hundred thousand dollars, hold the said property and effects as though the said last named company had been the endorser of said bonds and coupons, and had paid the same and foreclosed the said mortgage. And the said assignment further stipulated that the Mayor and City Council covenanted and agreed to indemnify said railroad company against all claims and demands arising out of the bonds of the said North Western Virginia Railroad Company for the interest thereon, which matured on the 1st day of July, 1856, and on the 1st day of July, 1861, or subsequent thereto, as well as that which may hereafter mature or accrue, and released and discharged the Baltimore & Ohio Railroad Company from all claims they might have in any manner against the said last named company, for interest on the bonds so guaranteed by the said Mayor and City Council, &c.

III.

Sale of Property Under the Mortgages.

The Baltimore & Ohio Railroad Company on the 15th day of February, 1865, caused a sale to be made at public auction of the property of the North Western Virginia Railroad Company, and bid the said property in at the sum of thirty-two thousand dollars. This sale was made under the authority of the deed or mortgage of the 21st of March, 1853, and of the assignment made to said company by the city of Baltimore, and with the express written authority of the N. W. Va. R. R. Co. The Record shows that the Baltimore & Ohio Railroad Company and the City of Baltimore, on the 21st day of July, 1864, had agreed upon certain propositions for the transfer of the interest of the city of Baltimore as a creditor and also as guarantor of the North Western Virginia Railroad Company in the lat-

ter's property, and that the North Western Virginia Railroad Company and the Baltimore & Ohio Railroad Company subsequently agreed upon certain propositions which are filed as "Exhibit Y," with the answer of the Baltimore & Ohio Railroad Company in this cause. This agreement as it will be seen, provided for the reorganization of the North Western Virginia Railroad Company and the capitalization of its indebtedness, upon the terms and principles fully expressed therein, and amongst other things it provides means by which something could be saved to the holders of the unendorsed bonds of the North Western Virginia Railroad Company, the contractor's final estimate bonds, and all creditors of said company as well as the stockholders thereof, who would accept the terms proposed thereby.

At that time the condition of the North Western Virginia Railroad Company was that of hopeless and incurable insolvency, and the debts secured by the first and second mortgages would necessarily absorb the whole property, if a sale thereof had been exacted, and yet leave a large portion of its indebtedness unsatisfied. At that time there was no apparent prospect that any of the stockholders, or any of the creditors other than those secured by the first and second mortgages, could ever realize a dollar of their demands. The city of Baltimore and the Baltimore & Ohio Railroad Company agreed upon this arrangement in order, if it might be possible to save something from the general wreck of the North Western Virginia Railroad Company to the stockholders, and the claims of creditors not included in the first and second mortgages. Carrying out this idea, the North Western Virginia Railroad Company, on the 28th day of September, 1864, issued a circular to its stockholders and the class of creditors alluded to, inviting their acceptance of the terms proposed. A

copy of the circular is filed with the papers of the cause, marked "Exhibit X." This was generally circulated and made known to all parties interested, and published at large, and a great many, both creditors and stockholders, accepted the terms offered and surrendered their certificates of stock and evidences of debt, and received certificates of stock in the reorganized company at the rate proposed in the circular; but some of the bondholders and others stood out and failed to accept the terms. It therefore became necessary and proper, in conformity to the *fifth article* of the agreement between the two companies, dated the 22nd day of July, 1864, that a sale of the property and works of the North Western Virginia Railroad Company should be made, for the purpose of carrying out said arrangement, and the same was accordingly made by the said Mayor and City Council of Baltimore, as trustees, under the deed to them of the 21st day of March, 1853, with the consent of the North Western Virginia Railroad Company, and after reasonable and legal notice had been given of the time and place of sale, as required by law, and at such sale the Baltimore & Ohio Railroad Company became the purchaser, in trust, for the benefit of itself and the stockholders, bondholders and other creditors who had assented to the terms proposed for the reorganization and recapitalization of the North Western Virginia Railroad Company.

IV.

Written Authority by N. W. Va. R. R. Co. to Sell under First and Second Mortgages.

The agreement by the North Western Virginia Railroad Company of the 22nd of July, 1864, which was executed by it by order of the company, by P. G. Van Winkle, its President, concerning the basis of the

arrangement between the Baltimore & Ohio Railroad Company and the North Western Virginia Railroad Company, contained the written consent of the said North Western Virginia Railroad Company to sell under the trust first mentioned, given by the latter company to the Mayor and City Council of Baltimore. This assent is contained in the *fifth clause*, which says: "If a sufficient number of the bondholders, creditors and stockholders mentioned in the two next preceding propositions do not assent to the terms proposed within the time mentioned, that is, by the 1st day of November, 1864, the North Western Virginia Railroad is to be offered for sale under one or more of the mortgages, in order to effect the purposes of the next proposition, which relates to reorganization. In the event of such a sale the B. & O. Railroad Company to become the purchaser thereat, either by themselves or by a person appointed by them for the purpose, of all the works and property of the North Western Virginia Railroad Company, at a sum not exceeding, [unless at their option], the amount secured by the first and second mortgages," &c. This agreement was duly executed. (See Exhibit Y, with the answer of B. & O. R. R. Co., Record, pp. 34-36, and No. 1 and No. 2, with the deposition of W. W. Van Winkle, pp. 63-65 Record.)

V.

Sale of the N. W. Va, R R. Co.'s Property under the Mortgage or Deed of Trust.

By the statutes of Virginia and West Virginia at the time the mortgages in question were made and at the time of the sale, the following provisions regulated the effect of such sale.

Code of Virginia, 1849, chapter 61.
Code of Virginia, 1860, chapter 61.

"28—If a sale be made under a deed of trust or mortgage, executed by a company on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale, other than debts due to it. Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the said purchaser shall forthwith be a corporation, by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded in the court in which the conveyance shall be recorded.

"29—The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had or should have been performed by the first company but for such sale and conveyance; save only that the corporation so created shall not be entitled to the debts due to the first company, and shall not be liable for any debts of or claims against the said first company, which may not be expressly assumed in the contract of purchase, and that the whole profit of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not exceeding together the amount of stock in the first company at the time of the sale, and assign the same in a book to be kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies

generally, except only that the first meeting of the stockholders shall be held on such day and at such place as shall be fixed by the said purchaser, of which notice shall be published for two weeks in a newspaper."

In view of the proposed sale of the property of the North Western Virginia Railroad Company under the mortgages referred to, the Legislature of West Virginia enacted the following:

An Act to empower certain Railroad Companies to purchase and hold real estate in the City of Parkersburg and Wood County. Passed February 28, 1865.

Be it enacted by the Legislature of West Virginia, The Baltimore & Ohio Railroad Company, the North Western Virginia Railroad Company, and the Marietta & Cincinnati Railroad Company, or any of them, or any railroad company connecting with any of the above named companies, or which may become the purchaser or purchasers of the North Western Virginia Railroad, are empowered to purchase and hold the following real estate in the City of Parkersburg, viz: lots numbered thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight and thirty-nine on the plat of the said city, being in quantity two and two-thirds acres of ground bounded by Washington, Green, Littleton and Avery streets; being the same formerly held by the North Western Virginia Railroad Company, known as the Central Depot, together with such other real estate in said city and in Wood county, not exceeding twenty acres in addition to the lands which such companies now have the right to acquire by law, as may be necessary for depot buildings, machine shops and other purposes appertaining to the business of railroad companies.

The foregoing act was passed as it imports, to enable the purchaser of the property of the North Western Virginia Railroad Company if a foreign corporation, to hold the title to real estate of that company.

The sale having been made in accordance with this agreement and power, at a meeting of the Board of Directors of the North Western Virginia Railroad Company on the 15th of March, 1865, *which approved the former action of the company in directing the said sale*, the President of the North Western Virginia Railroad Company reported that an agreement between the two companies had been duly executed on the part of the North Western Virginia Railroad Company and on the part of the B. & O. Company, and that the Mayor and City Council of Baltimore and the B. & O. Company had agreed to execute their part of the contract, and that as provided in the fifth of said propositions, the one quoted above, the works and property of the North Western Virginia Railroad Company had, on the 15th of February, 1865, been sold *under the deed of trust to the Mayor and City Council of Baltimore, being the first mortgage thereon*, and was purchased by the Baltimore & Ohio Railroad Company in trust for themselves and the bondholders and creditors and stockholders of the North Western Virginia Railroad Company who had assented to the terms of said proposition; said works and property to be held in trust until new certificates of stock could be issued in conformity with said fifth proposition, and that the purchaser had adopted the title of the new corporation as that of the Parkersburg Branch Railroad Company. The president also laid before the board a printed copy of the circular letter addressed to the creditors and stockholders of the North Western Virginia Railroad Company, issued on the 28th day of September, 1864, which action of the

president and the former board in relation to *said sale and disposition of said property*, in pursuance of said agreement *was unanimously approved.* (See exhibit 2, with the deposition of W. W. Van Winkle.)

It appears from the deposition of Peter G. Van Winkle, who was President of the North Western Virginia Railroad Company at the time the sale was made under said agreement, which is filed with the record in this cause, taken in December, 1870, that the circumstances which led to the sale of the property of the North Western Virginia Railroad Company were as stated in the answer of the company filed with the bill in this cause, and which are in substance as stated in this brief. He deposes that the city of Baltimore holding the deed of trust on the works and property of the North Western Virginia Railroad Company for a million and a half dollars [which his company had failed to pay the interest upon, on several occasions, and never paid any interest after July, 1859], and the deed of trust to the Mayor and City Council of Baltimore having become forfeited, as he calls it, the sale of said property was directed under the trust to be made by the said city or its assignees, and that such sale was made with the full knowledge of the North Western Virginia Railroad Company, and without opposition on its part; that the arrangements they were able to make with the city of Baltimore by which the city relinquished some seven hundred thousand dollars of its claim as set out in the articles of reorganization in printed pamphlet filed with the deposition of Mr. Van Winkle and with the answer in this cause, was of advantage and benefit to his railroad company; that the city had paid the six months interest on the bonds it had guaranteed of the North Western Virginia Railroad Company due July 1st, 1857, amounting to forty-five

thousand dollars; that they had advanced to the company between November 19, 1859, and April 17, 1862, upwards of one hundred and fifteen thousand dollars for arching tunnels on the North Western Virginia Railroad, on which they had received no interest; that they had also paid the interest on the bonds they guaranteed on and after January, 1860, up to the time of the sale, at the rate of ninety thousand dollars per annum; and by said agreement they agreed to pay the bonds they had guaranteed, and all the outstanding coupons thereon, amounting altogether, these items of payment by the said city, to upwards of nineteen hundred thousand dollars, including the guaranteed bonds.

In consideration of the transfer by the city of Baltimore of its rights and interests under said mortgages, to the Baltimore & Ohio Railroad Company, that company agreed, as will be seen by the contract dated July 21, 1864, with the city of Baltimore, to pay to said city the sum of one million two hundred thousand dollars on or before the 6th day of October, 1864, which it did pay to the said city in consideration of said assignment of said trust or mortgages, as in the answer of the said Baltimore & Ohio Railroad Company is set forth. Thus, not only was there *express authority* given by the North Western Virginia Railroad Company to the city of Baltimore or its assigns, to sell the property under the first mortgage or deed of trust, *but also a complete and explicit ratification* of the sale in the most formal manner that could be executed by the North Western Virginia Railroad Company.

This property was properly conveyed to the Baltimore & Ohio Railroad Company by deed duly executed, acknowledged and recorded, and thereupon the North Western Virginia Railroad Company under the authority conferred by the Code of West Virginia, was desig-

nated as the Parkersburg Branch Railroad Company, and by that name holds said property in trust for the joint benefit of the Baltimore & Ohio Railroad Company and the others entitled to share in the stock of said company as reorganized. (See "Exhibit E," filed with the bill.)

The deed or mortgage of the 21st day of March, 1853, "Exhibit A" with the bill, grants the property therein mentioned to the Mayor and City Council of Baltimore "in trust to secure the payment of the bonds or certificates of loan, with the interest thereon, according to their tenor, as described in said deed, to the end that the Mayor and City Council may be saved harmless and indemnified from all loss and injury consequent in any manner upon the guaranty of said bonds or certificates by the city of Baltimore."

On the same day the North Western Virginia Railroad Company executed to the Baltimore & Ohio Railroad Company a deed of trust or mortgage granting to the B. & O. Company all the property, works, &c., of the N. W. V. Company, in trust, to secure the payment of the bonds or certificates of loan, and the interest thereon, mentioned in said mortgage, subject to a prior mortgage to the Mayor and City Council of Baltimore: "Exhibit B," filed with the bill.

As will be seen by the agreement filed in this cause with the deposition of W. W. Van Winkle, Secretary of the Parkersburg Branch Railroad Company, and of Burton Despard, and exhibits filed, the North Western Virginia Railroad Company agreed and stipulated expressly that its property should be sold as conveyed by and under the first mortgage or deed of trust to the Mayor and City Council of Baltimore, and in pursuance of the arrangement it had made with the Baltimore & Ohio Railroad Company and the city of

Baltimore. The Baltimore & Ohio Railroad Company, as is seen by the assignment made to it by the city of Baltimore of the benefit the latter held under the first mortgage or deed of trust, had paid to the city of Baltimore one million two hundred thousand dollars and thereby relieved the city of its guaranty, to that extent, of the bonds mentioned in the first mortgage of the North Western Virginia Railroad Company, thus making the Baltimore & Ohio Railroad Company not only the guarantor of the North Western Virginia Railroad Company under the second mortgage, but also its creditor to the amount which it advanced and paid to the city of Baltimore to relieve it of its obligations. This assignment carried with it not only the bonds, but the loan secured by the first mortgage, and the agreement of July, 1864, between the North Western Virginia Railroad Company and the Baltimore & Ohio Railroad Company, by which the former consented to the proposed sale at public auction of all its property and works, and was a valid agreement, and in connection with the deed of the 21st of March, 1853, authorized in the fullest possible manner the Baltimore & Ohio Railroad Company to have that mortgage or deed of trust foreclosed.

VI.

ARGUMENT.

The plaintiff, Mattingly, instituted his suit on the 24th day of February, 1869, claiming, as before stated, to be the holder of loan certificates issued and secured by what is called the third mortgage deed of trust. The bill admits the validity of the debts secured by the first and second mortgages referred to, which it has been seen were intended to secure the indebtedness of the North Western Virginia Railroad Company, amount-

ing in the aggregate, without interest, to two million five hundred thousand dollars, and which were prior encumbrances. It will be seen by reference to "Exhibit C," filed with the bill, that the third mortgage or deed of trust was intended to cover the same property conveyed by the first and second mortgages, or deeds of trust, and is expressly made subject to them. It will be seen by reference to the record, "Exhibit F," that the North Western Virginia Railroad Company on the 21st day of December, 1857, made a deed of trust to James Cook to secure James M. Stephenson, James Cook, Daniel R. Neal, William Logan, Albert Leonard, Thomas Chancellor, John Simpson and William Spencer, in the sum of twenty thousand dollars, which conveyed to the said trustee certain lots in the town of Parkersburg, described therein. The Baltimore & Ohio Railroad Company on the 24th of December, 1857, consented that such deed of trust might be made, subject to the provisions of said trust, but did not, as charged in the bill, release any of its rights under the previous mortgages. It does not amount to a release of any interest in the first mortgage, because on the 24th day of December, 1857, the date of said consent in writing, the Baltimore & Ohio Railroad Company was not the owner or assignee of any interest in the first mortgage which had been made to the city of Baltimore on the 21st day of March, 1853, as hereinbefore shown. The plaintiff is in error in alleging in his bill that such consent amounted to a release or postponement of the lien of the two mortgages of March 21, 1853, aforementioned, "whereby, as plaintiff claims, the third mortgage was made the oldest and prior lien." The Baltimore & Ohio Railroad Company, not being the creditor mentioned in the first mortgage or deed of trust, notwithstanding its consent

to the execution of the fourth deed of trust, filed with the bill, had the right afterwards to purchase the incumbrances secured by the first mortgage, or deed of trust, and thus by a sale under it cut off any subsequent liens or incumbrances; and the sale of the real estate, consisting of town lots, under the said deed of trust of December, 1857, admitted to be valid by the plaintiff in his bill, and the Baltimore & Ohio Railroad Company having become the purchaser of such real estate for sixteen thousand three hundred and thirty-nine dollars at a sale regularly made, its title to said property became valid, and the plaintiff has never been in a position to question same.

Now, what is the situation of the plaintiff, Mattingly, in a case involving these circumstances? He stands only in the attitude of being the alleged holder of third mortgage bonds, which, if valid, stand third in priority, and coming into a court of equity, with full knowledge of the rights of the prior mortgagees and prior bondholders and of the amount of those incumbrances, he *does not propose to pay or secure the amounts due to prior mortgagees and bondholders, with the accrued interest thereon*, so that he may be in a condition to have the property of the North Western Virginia Railroad Company re-sold under his third mortgage. He does not pretend any ignorance of the circular letter issued by the North Western Virginia Railroad Company, that it proposed an arrangement by which something might be saved if the terms proposed were acceded to by its stockholders and bondholders. His bill does not show that he assented or dissented, but stood out. His bill does not show that the property of the North Western Virginia Railroad Company, at the time of the sale, would pay the bonds secured by the first and second mortgages, with the accruing interest thereon.

The second and third mortgages referred to only conveyed the equity of redemption which the North Western Virginia Railroad Company had in the property embraced therein, and if the plaintiff could have any standing in a court of equity, it would simply be with reference to the first and second mortgages on the ground that he might redeem from them. He stands in no better attitude towards them than the North Western Virginia Railroad Company stood.

VII.

Appellant made no tender and does not offer to redeem the Prior Mortgages.

The only right of the junior mortgagee, or person holding bonds or certificates secured by a junior mortgage, who has not been made a party to a foreclosure suit, if any had been instituted, is to redeem the property from the prior mortgages. It does not matter as to the junior mortgagee whether there was a surplus, or not, under the sale or foreclosure of the prior mortgage. It does not matter whether the property has increased or depreciated in value since the sale under the first mortgage. *The only right he has in the matter is the right of redemption.*

Appellant makes no tender of the amounts due on the prior mortgages. He is required, not only to tender, but to pay into Court the amount of all prior incumbrances.

Iowa v. Beeson, 55 Iowa, 262.
Regnor v. Sehin, 52 N. Y., 579.
Collins v. Riggs, 14 Wall., 491.
McCormick v. Knox, 105 U. S., 122-125.
2 Jones on Mortgages, sec. 1431.
Neckerman v. Neff, 43 Ind., 503.
Frost v. Bank, 70 N. Y., 557-558.

Bigelow v. Cassedy, 26 N. J. Eq., 557.
Loring v. Cooke, 3 Pick, 48.

The bill of complaint in this cause is in effect a bill to redeem, not to foreclose. As is stated in

Hudnit v. Nash, 16 N. J. Eq., 550,

a bill for foreclosure by a junior mortgagee making the first mortgagee the defendant is, as against such first mortgagee, in effect a bill to redeem, not to foreclose. The first mortgagee is not a necessary nor a proper party to a bill by a subsequent mortgagee to foreclose. In

Jerome v. McCarter, 94 U. S., 734,

it is held that where the effort of the junior mortgagee is to obtain the sale of the property or estate, and not merely of the equity of redemption, there is reason for making the prior incumbrances parties, for they have an interest in the decree. Ordinarily the general rule is, that in a suit by a junior mortgagee to foreclose a mortgage, prior mortgagees are not necessarily parties.

Edwards on Parties, 91.

In Payne v. Hook, 7 Wall., 432, the same doctrine is held; also French v. Shoemaker, 14 Wall., 315. The latter case is an important one on the principles applied in this case.

Williamson v. Probasco, 8 N. J. Eq., 571.

VIII.

Sale was Properly Made.

The bill denies *the authority of* the City of Baltimore *to cause sale of the property to be made*, because the deed of trust or mortgage of the 21st of March on its face does not expressly authorize or empower the trustee or mortgagee to sell—in other words, does not

contain an expressed power of sale—and this point is really the only point that the bill of the plaintiff pretends to make; and it is founded in the misapprehension of the position of the parties and of the rule in such cases. It is well settled that if a power of sale is expressly or impliedly conferred on a mortgagee or grantee in a deed which is made to secure and indemnify him, he may sell and convey the estate therein granted absolutely. It is not necessary that the power should be expressly conferred. It may be implied as was the case of Floyd v. Harrison, in 2 Robinson's Virginia Reports, 181. It is well settled that a mortgagee may sell the property under a power given for that purpose under the mortgage deed.

4 Kent's Commentaries, 141.

In Floyd v. Harrison, Judge Baldwin says: "Here there was no forfeiture and no foreclosure. The sale was made by the mortgagee not in that character—not as a creditor—but as a trustee appointed to possess, &c., and dispose of the estate. There are no considerations of justice or policy against the exercise of such a power, in which the grantor must be considered as having given his tacit concurrence, as much so as if he were present at the sale and acquiesced therein, which renders a sale by the mortgagee valid, though made by way of foreclosure." citing

Taylor v. Chowning, 3 Leigh, 654.

which is referred to with approval in

Mackey v. Langley, 92 U. S., 142.

In Taylor v. Chowning it was held where a mortgagee made sale of property conveyed to him, if he did in fact execute the power of sale fairly, and if the mortgagor was apprised of the sale, and present at it, and made no

objection to the proceedings, but on the contrary acquiesced in them, he will be regarded as waiving his objection to the defect of the mortgagee's power to sell, so far as the purchaser is concerned, and would not be allowed in equity to redeem as against the purchaser.

In the case at bar there is more than acquiescence by the mortgagor, the North Western Virginia Railroad Company. *There is express consent formally executed* and full authority conferred in writing upon the Mayor and Council of Baltimore to sell in manner in which the property was sold on the 15th of February, 1865. If, therefore, the mortgagor in this case had the right to consent to the sale and thereby waive any proceedings in foreclosure, and the sale was made, the mortgagor could not complain, nor can any subsequent creditor complain, or a creditor secured by a subsequent mortgage, unless he can show that the sale was unfairly made for an inadequate price, and that a sale otherwise made would have produced enough to have discharged all the previous encumbrances and left a surplus with which to have discharged his debt.

Recurring to the case of Floyd v. Harrison, p. 179, Judge Baldwin further adds: "It would hardly be doubted, I presume, that a debtor may by power of attorney authorize a creditor to sell his land, receive the purchase money, retain the amount of the debt and account for the residue, and that a conveyance of the title and surrender of possession for the better exercise of the power would be incompatible. A trust is not incompatible with a mortgage. A mortgagee in possession is a trustee, with authority to receive and account for the rents and profits. He may purchase the subject from the mortgagor, and *a fortiori* sell it by his permission to another. * * * Thus whether the transaction is to be regarded as a sale or as a mortgage, the

plaintiff is entitled to no relief against the derivative purchaser, and if entitled to any against his grantee alone he has waived it by declining the account."

The power of sale need not be expressly conferred by the mortgagee. It may be implied or it may be conferred by a separate instrument.

Brisbane v. Stoughton, 17 Ohio, 482.
Alexander v. Coldwell, 61 Ala., 543.
Cullen v. Graeme, 22 Gratt., 266.
Hyman v. Deveraux, 63 N. C., 624.

In Brisbane v. Stoughton the mortgage contained no power of sale. This power was given by a letter of attorney, executed to a third person, authorizing him to sell the mortgaged premises for the benefit of the mortgagee, and the Supreme Court of Ohio held that it was a valid power for such purpose, and after a *bona fide* sale made thereunder, proper notice having been given by advertisement, no equity of redemption remained in the mortgagor and those claiming under him. This is explicitly in point.

2 Jones on mortgages, sec. 1777.

When the mortgagor makes no objection to the sale, this ends any defect, if it were defective, and gives it validity.

Mackey v. Langley, 92 U. S., 142.
Benham v. Rowe, 2 Cal., 387.

If, as we have seen, the North Western Virginia Railroad Company, the mortgagor, expressly authorized and ratified the sale made, and the sale was for a valuable consideration and adequate, taking into consideration the amount of incumbrances held by the purchaser, which was prior to that of the alleged claim of of the plaintiff, and nothing in the record tends to

show fraud or illegality in the transactions between the mortgagor and mortgagees resulting in such sale, it is plain that the plaintiff has no interest in the subject of the controversy, unless he is prepared, on a proper bill, to redeem or secure the entire amount of the incumbrances prior to his own.

It is no objection to the sale that it was for cash. When the power does not prescribe the terms of sale, it is properly for cash.

Olcott v. Bynum, 17 Wall., 44.

See, also,

2 Jones on Mortgages, sec. 1871.

The mortgagee or his assignee has the right to buy the property at his own sale.

2 Jones on Mortgages, sec. 1881.
Dobson v. Racy, 8 N. Y., 216.
Weld v. Rees, 48 Ill., 428.
Jacobs v. Turpin, 83 Ill., 424.

Upon the whole case the appellant had no right to any relief; and his bill was properly dismissed.

JNO. A. HUTCHINSON.
Of Counsel for Baltimore & Ohio R. R. Co., Appellee.